

Missouri Attorney General's Opinions - 1975

Opinion	Date	Topic	Summary
1-75	Jan 31		Opinion letter to Herbert R. Domke, M.D.
2-75	Jan 8		Opinion letter to the Honorable Ed Bohl
3-75	Mar 11		Opinion letter to the Honorable Phillip H. Snowden
4-75	May 16		Opinion letter to the Honorable Jerold L. Drake
5-75			Withdrawn
6-75	Jan 6		Opinion letter to the Honorable James A. Noland, Jr.
8-75			Withdrawn
10-75	Feb 11	SUNSHINE BILL. COUNTY COUNCIL. PUBLIC MEETINGS.	Luncheon meetings of either the majority party members or of the minority party members of the St. Louis County Council, at which public business is discussed, are required to be open to the public under the Sunshine Bill.
12-75	Mar 11		Opinion letter to Herbert R. Domke, M.D.
14-75	Feb 21		Opinion letter to Mr. Mark L. Edelman
16-75	Jan 29		Opinion letter to Mr. Lee E. Norbury
17-75	Jan 15		Opinion letter to the Honorable J. William Holliday
21-75	Jan 29	STATE EMPLOYEES. TORT DEFENSE FUND. CONSERVATION COMMISSION.	The Conservation Commission may not pay a final judgment for actual or punitive damages obtained against one of its enforcement officers as a result of his conduct while he was in the actual performance of his enforcement duties.
22-75	Apr 15		Opinion letter to Mr. George M. Camp
24-75	May 12	SCHOOLS. TEACHERS.	No valid contract existed between a teacher and a board of education when the teacher failed to secure before the beginning of school the specific certificate that was an express condition of the contract. Since there was no valid contract between the teacher and the school board, the teacher's certificate of license to teach cannot be revoked because no valid contract was annulled when the teacher failed and refused to teach in a position for which he did not have a valid certificate of license.
25-75	Feb 28	DEPARTMENT OF SOCIAL SERVICES. REORGANIZATION	No merit status can be lost by the transfer or realignment of a unit or position under the Reorganization Act where the essential identity of the position or unit is retained and the position or unit was within

		ACT. MERIT SYSTEM.	merit coverage on the effective date of the Act. A position which was subject to the provisions of the merit system law on the effective date of the Reorganization Act cannot be named as one of three "exempt" positions by a division director under Section 13.1 of that Act.
26-75	Mar 5		Opinion letter to the Honorable Robert O. Snyder
27-75	Mar 24	CITIES. COUNTIES. CITY PARKS. RECREATION. FEDERAL GRANTS. WATERSHED DISTRICTS. COOPERATIVE AGREEMENTS. UNIFORM RELOCATION ASSISTANCE ACT.	(1) The city of Holden may contribute funds to a multi-purpose watershed protection project six miles outside the city limits which includes recreational facilities pursuant to Section 278.145, RSMo, and (2) the city of Holden, Missouri, Johnson County, Missouri, and the South Fork of the Blackwater River Watershed Subdistrict have the authority to make relocation assistance payments pursuant to 42 U.S.C. §§ 4601, et seq.
28-75	May 12		Opinion letter to Mr. Edward A. Godar
29-75	Mar 11		Opinion letter to the Honorable John W. Reid, II
30-75	Feb 19		Opinion letter to Dr. Robert D. Elsea
31-75	Feb 10		Opinion letter to Mr. George M. Camp
32-75	Jan 13	SHERIFFS. PARTITION. COMPENSATION. CONFLICT OF INTEREST.	Sheriffs in a third or fourth class county may not be appointed to the office of special commissioner pursuant to Section 528.540, RSMo 1969, relating to partitions; a sheriff in the above counties may be appointed as one of the commissioners under Section 528.200, RSMo 1969; a sheriff appointed to the position of commissioner under Section 528.200, RSMo 1969, may retain the fees he receives as compensation for his service in that position, and the wife of a sheriff may be appointed to either the position of commissioner or special commissioner and may retain the fees that she receives therefor.
33-75	Mar 4	SCHOOLS.	In computing "the average cost of transporting all children of the district" and in computing "the additional cost of transporting handicapped and severely handicapped children" for the purposes of Section 162.985, RSMo 1973 Supp., all expenditures reasonably related to the school district's transportation program should be included in the computation. The amount of additional state transportation aid authorized by Section 162.985, RSMo 1973 Supp., with respect to handicapped and severely handicapped children should be determined by the following formula: a district's average cost of transporting a handicapped or severely handicapped child minus average per pupil

			cost of transporting all children in the district (handicapped, severely handicapped and non-handicapped) times the number of handicapped and severely handicapped children transported divided by two.
37-75	Feb 5	GOVERNOR. MERIT SYSTEM. REORGANIZATION ACT. DIVISION OF ADMINISTRATION. COMMISSIONER OF ADMINISTRATION.	Division heads who are provided for in departmental plans pursuant to Section 1.6(2) of S.B. No. 1, First Extraordinary Session, 77th General Assembly, are division heads who are to be appointed by the department director under Section 1.6(6) of S.B. No. 1, and therefore such appointments come under the exemption of subsection 1(1) of Section 36.030, H.B. No. 8, First Extraordinary Session, 77th General Assembly, and are not covered by provisions of the merit system law, subject, of course, to Article IV, Section 19, Constitution of Missouri.
39-75	Mar 20		Opinion letter to the Honorable Christopher S. Bond
40-75	Apr 23	HOSPITALS. PHYSICIANS. FEDERAL GRANTS. PUBLIC RECORDS. DIVISION OF HEALTH.	The State Board of Health is authorized by law to adopt and enforce regulations requiring hospitals licensed by the state to submit reports containing certain data relating to hospital discharges.
41-75	Apr 30		Opinion letter to Mr. Edward A. Godar
42-75	Jan 27		Opinion letter to the Honorable Lawrence J. Lee
43-75	Jan 27		Opinion letter to Harold P. Robb, M.D.
44-75	Feb 19		Opinion letter to the Honorable Howard M. Garrett
46-75	Apr 30		Opinion letter to Dr. Jack Cross
47-75	Jan 15	LIENS. MECHANICS' LIENS.	Only a contractor who deals directly with a consumer is required to provide the notice specified in Section 429.010, House Bill 1251, 77th General Assembly. A subcontractor who further subcontracts the supplying of labor or materials is not required to provide notice. An original contractor supplying materials which its own employees install in the home of a consumer is required to give the notice provided for in Section 429.010.
48-75	June 25	SCHOOLS. SCHOOL DISTRICTS. SCHOOL TRANSPORTATION. DEPARTMENT OF MENTAL HEALTH.	(1) The cost of special educational services, including transportation, for a handicapped child who has been placed in a home by the Missouri Department of Mental Health, regardless of where those services are provided, is paid by the Department (under the provisions of Section 162.970, RSMo Supp. 1973). The Department of Mental Health is then reimbursed by the school district in which the parent or guardian resides or which would otherwise be responsible for special educational services for the child in an amount not to exceed the average sum produced per child by the local tax effort of the parent's district. (2) The cost of special educational services and of

			transportation for a handicapped child not admitted to the programs or facilities of the Missouri Department of Mental Health who resides in a home that provides care or treatment -- whether the child is an offender or troubled, abandoned, or neglected -- is the responsibility of the school district in which the home is located. If the responsible district does not provide those services itself, it must contract with another district or with a public or a private agency for those services and it must provide transportation to the place where the services are provided.
49-75			Withdrawn
50-75	Mar 12	CONVICTS. PROBATION AND PAROLE.	Section 549.071, RSMo 1969, authorizes courts to grant extensions of paroles subject to statutory restrictions and authorizes such courts to grant terms of parole which extend beyond the original expiration date of a parolee's sentence.
51-75	Feb 10		Opinion letter to the Honorable D. R. Osbourn
53-75	Mar 18	COMPENSATION. ADJUTANT GENERAL. STATE EMPLOYEES. REORGANIZATION ACT. DEPARTMENT OF PUBLIC SAFETY.	(1) Department heads have authority under Senate Bill No. 1, 77th General Assembly, to set the salary of division and other administrative positions subject to appropriations therefor. (2) The salary of the Adjutant General established by the first departmental plan filed before June 30, 1974, providing for a salary of \$18,000.00 per year for the Adjutant General, constitutes the salary which the Adjutant General may be paid at present. The salary may be changed by a subsequent departmental plan.
54-75	Jan 6		Opinion letter to the Honorable Richard J. DeCoster
56-75	May 20		Opinion letter to Mr. Alfred C. Sikes
61-75	Jan 23		Opinion letter to the Honorable Frank Bild
62-75	Mar 19	SAVINGS AND LOAN. DEPOSITARIES. SCHOOL DISTRICTS. SCHOOLS.	Qualifying school districts may place certain funds in savings accounts or certificates of deposit in insured savings and loan associations under the provisions of Section 369.194, RSMo Supp. 1973 and Section 165.051, RSMo.
63-75	Mar 31	BONDS. STATE AUDITOR.	The maximum amount of bonded indebtedness in 1975 is to be determined by the 1974 assessed valuation of tangible personal property although Senate Bill 333, 77th General Assembly, Second Regular Session, excludes household goods from taxation beginning January 1975.
64-75	May 7		Opinion letter to Dr. Jack Cross
65-75			Withdrawn
67-75			Withdrawn

69-75	Mar 24		Opinion letter to Mr. Michael D. Garrett
70-75	Apr 3	SEWERS. SEWER DISTRICTS. COOPERATIVE AGREEMENTS. COUNTY COURT. SEWER SUBDISTRICTS.	A county court may create a sewer subdistrict pursuant to Sections 204.331 and 204.332, RSMo Supp. 1973, and such subdistrict shall have, in addition to those powers specified in Section 204.331, the powers given to sewer districts under Sections 249.430 to 249.660, RSMo 1969. However, in the creation of such a sewer subdistrict under Section 204.331, <u>et seq.</u> , the county court must comply with the provisions of Sections 249.470 and 249.480, RSMo 1969. If such a sewer subdistrict is created, the county court, as governing body of the sewer subdistrict, may enter into a contract with a common sewer district created pursuant to Section 204.250, RSMo Supp. 1973, and Sections 204.260 to 204.470, RSMo 1969, whereby the common sewer district would provide any engineering, construction, maintenance, repair and administrative services required for the collection and treatment of sewage generated within the subdistrict.
71-75	Feb 4		Opinion letter to the Honorable Fred Williams
72-75	Feb 27		Opinion letter to Mr. Edward A. Godar
73-75	Jan 29		Opinion letter to Mr. William J. Raftery
73T-75	Oct 30		Opinion letter to Mr. J. Neil Neilsen
74-75	Jan 27		Opinion letter to Mr. William J. Raftery
77-75			Withdrawn
78-75	Feb 4		Opinion letter to the Honorable Theodore L. Johnson, III
80-75	Feb 6		Opinion letter to Mr. Lawrence Graham
84-75			Opinion letter to Mr. William J. Raftery
85-75	Feb 14		Opinion letter to the Honorable Nelson B. Tinnin
87-75	Feb 10		Opinion letter to the Honorable Ike Skelton
88-75	Feb 28	ASSESSMENTS. STATE AUDITOR. STATE TAX COMMISSION.	(1) The State Tax Commission has the authority and is obligated to equalize the assessments of property among the various counties and the City of St. Louis pursuant to Section 138.390, RSMo, and has the duty to order any county in which valuations of property are below 33 1/3% of true value to raise the valuation of such property to 33 1/3% of true value and to order any county in which valuations of property are above 33 1/3% of true value to lower the valuation of such property to 33 1/3% of true value. (2) The State Tax Commission has no authority to equalize the assessments among various parcels of property within a county as such, but individual assessments can be raised or lowered pursuant to Sections 138.380, 138.460, and 138.470,

			RSMo. (3) The State Auditor has no authority to compel the State Tax Commission to require the equalization of assessments among the various counties or the City of St. Louis at 33 1/3% of true value.
89-75	Feb 27		Opinion letter to Mr. Paul W. Collins
92-75	Mar 24	SEWERS. FEDERAL GRANTS. WATER POLLUTION. CLEAN WATER COMMISSION. CITIES, TOWNS AND VILLAGES.	The City of Farmington may impose user charges pursuant to Section 204.026 (18), RSMo Supp. 1973, to cover costs of operation and/or future expansion of a public sewer treatment facility constructed pursuant to a grant of federal funds under 33 U.S.C., Sections 1281-1292, without the necessity of an election as provided in Section 71.715, RSMo 1969.
93-75	Mar 3		Opinion letter to the Honorable John W. Reid, II
94-75	May 28		Opinion letter to the Honorable Frank Bild
96-75	Mar 28		Opinion letter to the Honorable A. J. Seier
97-75	Sept 22		Opinion letter to the Honorable Jerry E. McBride
98-75	Mar 28	AUDITS. COUNTIES. STATE AUDITOR. CITIES, TOWNS & VILLAGES.	1) The scope of an audit requested pursuant to Section 29.230.2, RSMo, lays within the discretion of the State Auditor, provided that discretion is reasonably exercised; (2) the State Auditor is authorized to include those public offices in the City of St. Louis performing a function comparable to a county within an audit of the City of St. Louis, requested pursuant to Section 29.230.2, RSMo; and (3) there is no requirement that the political subdivision, which is to be audited, produce to the Auditor the receipt of the state collector showing that the cost of such audit has been paid to the collector.
99-75	Apr 9		Opinion letter to the Honorable Clarence H. Heflin
100-75			Withdrawn
102-75	Sept 10		Opinion letter to Mr. J. Neil Nielsen
105-75	Apr 9		Opinion letter to the Honorable Ralph Jones
106-75	Apr 7		Opinion letter to the Honorable Jim Arnold
109-75			Withdrawn
110-75	Sept 10		Opinion letter to the Honorable Harold J. Esser
111-75	Apr 21	SCHOOLS. SCHOOL	The board of education of a six-director public school district is not authorized by Section 167.231, RSMo, to submit to the voters of the

		TRANSPORTATION.	district the question of whether transportation to and from school at the expense of the district should be provided for pupils living one mile or more from school.
113-75	June 25	CIRCUIT ATTORNEYS. PROSECUTING ATTORNEYS.	The prosecuting attorney in each county and the circuit attorney of the City of St. Louis have authority to institute civil collection remedies for the collection of moneys assigned to the state under the provisions of Public Law 93-647, relating to family support.
114-75	May 27		Opinion letter to Mr. James I. Kennedy
115-75	June 26	TAXATION (CIGARETTES).	Under provisions of House Bill No. 1612 of the 77th General Assembly, a cigarette wholesaler who purchases cigarette tax stamps or meter units on a deferred payment basis must pay for such stamps or meter units on or before the fifteenth day of the month following the month in which the stamps or meter units were purchased.
116-75	May 28	SCHOOLS. TEACHERS.	Employment "in any other school system," as that phrase is used in Section 168.104(5), RSMo 1969, includes any full-time teaching position, whether inside or outside of Missouri and whether in public or private schools. It includes teaching service in a junior college, four-year college, or university and in a bona fide early childhood or preschool program.
120-75	May 1		Opinion letter to the Honorable Harold L. Lowenstein
122-75	May 7		Opinion letter to Harold P. Robb, M.D.
124-75	June 10	COUNTIES. SOIL DISTRICTS. CONSTITUTIONAL LAW. SOIL & WATER CONSERVATION.	(1) Soil and water conservation districts, organized under the provisions of Chapter 278, RSMo, are not private corporations, but are public, political subdivisions of the state, and (2) Section 278.145, RSMo 1969, providing for aid to soil and water conservation districts from cities and counties, does not violate Article VI, Section 25, Missouri Constitution.
125-75	May 30		Opinion letter to Dr. Arthur L. Mallory
126-75	May 27		Opinion letter to the Honorable Kenneth J. Rothman, Honorable James P. Mulvaney and Honorable Wayne Goode
127-75	June 19		Opinion letter to Mr. Lawrence L. Graham
128-75	May 7		Opinion letter to Dr. Arthur L. Mallory
129-75	May 22		Opinion letter to Harold P. Robb, M.D.
130-75			Withdrawn
133-75	May 30	POLICE. CITY POLICE.	The metropolitan police systems in St. Louis and Kansas City are "state agencies" within the meaning of Section 29.200, RSMo.

		STATE AUDITOR. STATE AGENCIES. CITIES, TOWNS & VILLAGES.	
134-75	July 1		Opinion letter to the Honorable Earl L. Schlef
135-75			Withdrawn
137-75	May 16	PENSIONS. RETIREMENT. CLEAN WATER COMMISSION. DEPARTMENT OF NATURAL RESOURCES. STATE EMPLOYEES' RETIREMENT SYSTEM.	Under Section 104.380.1(1), RSMo Supp. 1973, the Director of the Department of Natural Resources, and not the Clean Water Commission, is the "head of the department" for purposes of retention of a director of staff to the Commission beyond normal retirement age.
139-75	June 30		Opinion letter to James P. Anderton
140-75	May 29		Opinion letter to the Honorable W. Swain Perkins
141-75	July 3	COUNTIES. OFFICERS. COUNTY JUDGES. COUNTY OFFICERS. CONFLICT OF INTEREST.	The presiding judge of the county court of Ripley County cannot be employed and paid compensation for his services to supervise the courthouse renovation project.
142-75	July 24	STATE AGENCY. STATE AUDITOR. BI-STATE DEVELOPMENT AGENCY. KANSAS CITY AREA TRANSPORTATION AUTHORITY.	The Bi-State Development Agency and the Kansas City Area Transportation Authority are not "state agencies" within the meaning of the term as used in Section 29.200, RSMo, and the State Auditor is not authorized to postaudit their accounts.
143-75	July 22		Opinion letter to Mr. Daniel M. Buescher
144-75	Aug 1	SUNSHINE LAW. ST. LOUIS CITY. CITIES, TOWNS & VILLAGES.	Budgetary meetings of the St. Louis Board of Estimate and Apportionment and the St. Louis Board of Education are "public meetings" under Section 610.010, RSMo Supp. 1973, and may not be closed pursuant to Section 610.025, RSMo Supp. 1973.
145-75	July 16		Opinion letter to the Honorable Dan Harmon

146-75	June 25		Opinion letter to the Honorable Frank Bild
147-75	June 2	MINORS. CHILD ABUSE. CRIMINAL LAW.	The term “reasonable cause to believe” as used in H.B. 578 is the equivalent of the term “suspected” as used in the Federal Register, Volume 39, No. 245, Section 1340.3-3(d)(2)(i).
148-75			Withdrawn
149-75	May 30		Opinion letter to Dr. Arthur L. Mallory
151-75	Nov 5		Opinion letter to the Honorable William Raisch
152-75	June 13		Opinion letter to the Honorable John T. Russell
153-75	Nov 18		Opinion letter to the Honorable Robert A. Young
155-75	July 18	OFFICERS. CITY OFFICERS. SUNSHINE LAW.	Meetings of the Columbia City Council regarding the hiring of a municipal judge or city manager fall within the “personnel” exception of § 610.025(4) of the Sunshine Law (§§ 610.010, <u>et seq.</u> , RSMo Supp. 1973) and therefore may be closed to the public.
156-75			Withdrawn
157-75	June 13		Opinion letter to the Honorable James C. Kirkpatrick
158-75	July 1		Opinion letter to the Honorable James I. Spainhower
159-75	July 2		Opinion letter to Dr. Arthur L. Mallory
160-75	July 1		Opinion letter to Mr. Lawrence L. Graham
162-75	July 2		Opinion letter to Dr. Arthur L. Mallory
163-75	Aug 22	STATE PURCHASING AGENT. INSURANCE.	Under Chapter 34, RSMo, relating to the state purchasing agent, the definition of “contractual services” is not limited to those items specifically mentioned. The phrase “contractual service” includes insurance purchased by the state, and, therefore, any such insurance must be purchased pursuant to the provisions of Chapter 34, RSMo, except as otherwise provided by law.
164-75	July 23	COUNTIES. DEPOSITARIES. COUNTY COURTS. COUNTY DEPOSITARIES.	Counties, cities, and other political subdivisions specified in Section 110.010, RSMo, are authorized to invest their funds in time deposits, including certificates of deposit. Advertisement for bids is not required.
165-75	July 2		Opinion letter to Dr. Arthur L. Mallory
166-75	July 2		Opinion letter to Dr. Arthur L. Mallory

167-75	July 14		Opinion letter to the Honorable William O. Green
169-75	July 22		Opinion letter to Mr. Ronald L. Boggs
170-75	July 23		Opinion letter to Mr. James R. Spradling
171-75	Aug 18		Opinion letter to the Honorable Theodore L. Johnson III
172-75	Sept 10		Opinion letter to the Honorable Doris M. Quinn
173-75	Aug 11		Opinion letter to Dr. Arthur L. Mallory
174-75	Aug 4	ELECTIONS. CRIMINAL LAW. HIGHWAY PATROL. MISSOURI ELECTIONS COMMISSION.	The Missouri Elections Commission is empowered to seek and receive investigative assistance from the Missouri State Highway Patrol in the investigation of apparent violations of the Campaign Finance and Disclosure Law.
175-75	July 10	GENERAL ASSEMBLY.	<p>1. A member of the Missouri General Assembly who took office in January, 1973, cannot during the term for which he was elected accept the position of Director of Coordination of Technical Vocational Programs for the Department of Higher Education which position was created after January, 1973, because such acceptance would violate Article III, Section 12, Constitution of Missouri.</p> <p>2. A resignation submitted to the Governor by a member of the General Assembly when the General Assembly is in session is invalid and a nullity and does not result in a vacancy in office.</p>
179-75	July 16		Opinion letter to the Honorable James C. Kirkpatrick
180-75	July 24		Opinion letter to the Honorable Hugh C. Roberts, Jr.
181-75	Oct 15		Opinion letter to the Honorable E. Thomas Coleman
182-75	Oct 3	EMPLOYMENT SECURITY. CONSTITUTIONAL LAW.	<p>1. The legislative history of the Reed Act, which provides for advances to States with depleted reserve accounts for the purpose of assisting them in the financing of their unemployment benefit payments, indicates that the advances are not regarded as a "loan to the State."</p> <p>2. Any advance which would be received by the State of, Missouri from the Federal Government under Title XII of the Social Security Act (42 U.S.C.A. § 1321) does not create a liability of the State of Missouri. 3. The receipt of advances by the State of Missouri under Title XII of the Social Security Act (42 U.S.C.A. § 1321) would not be in violation of Article III, Section 37 of the Missouri Constitution or subsection 1 of Section 288.330, RSMo 1969.</p>
183-75			Withdrawn
184-75	Sept 2		Opinion letter to Mr. James L. Wilson

185-75	Oct 20		Opinion letter to Mr. Alfred C. Sikes
186-75	Oct 14	MOTOR VEHICLES. RECIPROCITY AGREEMENTS.	(1) The Missouri Department of Revenue may register a motor vehicle in the name of the lessee of such vehicle and issue base license plates therefor without issuing a certificate of ownership (title) for such motor vehicle if such motor vehicle is otherwise properly and duly registered pursuant to the IRP; (2) however, the Missouri Department of Revenue may not register and issue base license plates for a motor vehicle without first issuing a certificate of ownership if such motor vehicle is registered pursuant to the Uniform Vehicle Registration Proration and Reciprocity Agreement.
187-75	Aug 19		Opinion letter to the Honorable George W. Lehr
188-75	Oct 15	ARRESTS. SUNSHINE LAW.	Where the necessary preconditions have occurred, § 610.100 and § 610.105, RSMo Supp. 1973, require that the appropriate law enforcement agencies, on their own initiative, must close or expunge the records relating to arrest, detention or confinement. The issuance of an injunction or other court order is not a prerequisite to the closing or expunging of such records.
192-75	Aug 19		Opinion letter to Dr. Arthur L. Mallory
193-75	Sept 10		Opinion letter to Mr. Lawrence L. Graham
194-75	Sept 16		Opinion letter to Dr. Jack L. Cross
196-75	Sept 23	COURTS. COUNTIES. COUNTY COURTS. CIRCUIT COURTS.	A circuit court judge who was sued in the United States District Court on a matter directly connected with his judicial function as a Missouri circuit court judge, has the authority to appoint private counsel to represent him in the United States District Court and to order the payment of a reasonable and proper sum for the services of such counsel to be paid by the county.
197-75	Sept 22		Opinion letter to the Honorable Donald L. Manford
199-75	Sept 24		Opinion letter to the Mr. C. E. Hamilton, Jr.
200-75			Withdrawn
202-75	Sept 30		Opinion letter to the Honorable Kenneth J. Rothman
204-75	Oct 21		Opinion letter to Mr. J. Neil Nielsen
205-75	Dec 19		Opinion letter to Mr. Milt Harper
206-75			Withdrawn
207-75	Oct 15		Opinion letter to the Honorable Edward C. Graham
208-75	Oct 22	SEWERS. COUNTY COURT.	(1) A county court which creates a sewer district pursuant to Sections 249.430 to 249.667, RSMo 1969, may contract with a private party to

		SEWER DISTRICTS.	perform all operation, repair, and maintenance functions associated with the district's sewer system; (2) the existence of such a contract does not alter or delegate the legal responsibilities of the county court for the operation and maintenance of the sewer system under Sections 204.006 to 204.141, RSMo Supp. 1973; (3) the county court must bill for sewer service charges and collect such charges itself, under the procedure set out in Section 249.640; and (4) the special tax assessments issued pursuant to Sections 249.640 and 249.645 may not be assigned to a private entity for collection.
209-75	Oct 20	STATE AUDITOR. SUNSHINE LAW. PUBLIC RECORDS. PUBLIC MEETINGS.	Raw files, work papers, and other documents and meetings held preparatory to the issuance of signed audit reports of the State Auditor issued pursuant to Section 29.270, RSMo 1969, shall not be open to the public.
210-75	Dec 12	CORPORATIONS. SECRETARY OF STATE.	A corporation must submit a separate annual registration report for each year the corporation was in forfeiture and a corporation must pay the maximum registration fee of \$40 for each year the corporation was in forfeiture before the forfeiture may be rescinded by the Secretary of State. Rescission restores the corporation to good standing as of the date of forfeiture, except for exceptions set forth in Section 351.540(2), Senate Bill No. 14, 78th General Assembly.
213-75	Oct 15		Opinion letter to the Honorable Margaret Miller
214-75	Nov 13	ASSESSORS. ASSESSMENTS. COMPENSATION. COUNTY JUDGES.	1. The rate of compensation of county assessors in third and fourth class counties and second class counties except those having an assessed valuation in excess of three hundred million dollars as of January 1, 1974, for additional duties required by Section 53.073 (Senate Bill No. 373, 77th General Assembly, Second Regular Session), shall be based upon their county's total assessed valuation for the tax year which encompasses the first day of September beginning the annual salary period. 2. The rate of compensation of county court judges in second, third, and fourth class counties for additional duties authorized in Senate Committee Substitute for Senate Bill No. 95, 78th General Assembly, First Regular Session, shall be based upon the assessed valuation of the county for the tax year immediately preceding the year in which the compensation is due.
215-75	Oct 7		Opinion letter to the Honorable R. L. Usher
216-75	Nov 3		Opinion letter to the Honorable S. Sue Shear
217-75	Nov 5		Opinion letter to the Honorable Irene E. Treppler
221-75			Withdrawn
223-75	Nov 25		Opinion letter to the Honorable George W. Lehr

224-75		AUDITS. COUNTIES. STATE AUDITOR. COUNTY HOSPITALS.	The State Auditor is obligated to include county hospitals established pursuant to Sections 205.160 to 205.340, RSMo, within the scope of his audit of counties containing such an institution.
226-75	Dec 1		Opinion letter to Ms. Virginia G. Young
228-75			Withdrawn
230-75	Nov 25		Opinion letter to the Honorable John W. Reid, II
231-75	Nov 3		Opinion letter to the Honorable Phil Snowden
235-75	Dec 31	PENSIONS. RETIREMENT. COMPENSATION. CONSTITUTIONAL LAW. MISSOURI EMPLOYEES' RETIREMENT SYSTEM.	1. An individual who is presently retired and receiving retirement benefits which were calculated by multiplying one percent (1%) of his average pay (not to exceed \$7,500 per year) during the five consecutive years of his work when his pay was the greatest, times his years of creditable service, is entitled to have his benefits recalculated under subsection 1 of Section 104.610, Senate Bill No. 5, 78th General Assembly, First Regular Session, in order that the individual may receive additional compensation from the state for services as a special consultant. 2. If an individual's benefits are to be recalculated under the provisions of subsection 1 of Section 104.610, Senate Bill No. 5, 78th General Assembly, First Regular Session, then said individual is also eligible for the increase in compensation under the provisions of Section 104.090, RSMo Supp. 1973.
237-75	Nov 26		Opinion letter to Mr. Warren L. McElwain
239-75	Dec 11		Opinion letter to the Honorable Vernon King
242-75	Dec 4		Opinion letter to Dr. Arthur L. Mallory
244-75	Dec 19		Opinion letter to the Honorable James C. Kirkpatrick
247-75	Dec 11		Opinion letter to the Honorable Donald J. Gralike
254-75	Dec 31		Opinion letter to the Honorable Michael B. Hazel



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

January 31, 1975

OPINION LETTER NO. 1

Herbert R. Domke, M.D.
Director, Division of Health
Department of Social Services
Post Office Box 570
Jefferson City, Missouri 65101

Dear Dr. Domke:

This is in response to your request for our official legal opinion on the following question:

"Do the adulteration and misbranding provisions of the Missouri Food and Drug Law, Sections 196.010--196.120, RSMo. still apply to meat or meat products at the retail store or restaurant level in view of the enactment of the Missouri Meat Inspection Law, Sections 265.300--265.460, RSMo. even though these later sections mentioned are not being administered since delegation of these responsibilities to the USDA?"

The Missouri Meat Inspection Act, §§265.300-265.470, RSMo (L.Mo. 1967, p. 371; A.L.Mo. 1971-1972, p. 299), provides for the regulation of all "commercial plants" by the State Department of Agriculture. A "commercial plant" is defined to include ". . . any establishment . . . in which meat or meat products are prepared for transportation or sale as articles of commerce, . . ." §265.300(4), RSMo. The Director of Agriculture is required to exempt from regulation the operation of any person to the same extent that exemptions are made under the Federal Meat and Poultry Inspection Acts. §265.320, RSMo. The act authorizes the Department of Agriculture to seize or stop the sale of meat or meat products which are "adulterated" or "misbranded." §§265.370 and

Herbert R. Domke, M.D.

265.444, RSMo. Criminal penalties are also provided for persons selling or offering to sell "adulterated" or "misbranded" meat or meat products. §265.460, RSMo. An "adulterated" or "misbranded" meat or meat product is one that exists under the circumstances listed in the Federal Meat Inspection Act, 21 U.S.C. §601. §265.300(1) and (9), RSMo.

The Federal Wholesome Meat Act, 21 U.S.C.A. §§601, et seq., includes elaborate definitions of the terms "adulterated" and "misbranded." 21 U.S.C.A. §601(m) and (n). These definitions were obviously lifted, without substantial modification, from the Federal Food, Drug, and Cosmetic Act of 1938, 21 U.S.C.A. §§301, et seq., specifically §342 ("adulterated") and §343 ("misbranded").

The 1943 amendments to the Missouri Food and Drug Law adopted without substantial deviation these same definitions from the 1938 Federal Act. §§196.010-196.120, RSMo, specifically §196.070 ("adulterated") and §196.075 ("misbranded") (L.Mo. 1907, p. 238, A.L.Mo. 1943, p. 559).

Thus, the effect of the 1971 amendments to the Missouri Meat Inspection Act was to at least reiterate the definitions of "adulterated" and "misbranded" meat and meat products that were found in the earlier enacted Missouri Food and Drug Law. However, to the extent of any inconsistencies in such definitions, we believe those contained in the Meat Inspection Act must prevail under the rule that later laws impliedly repeal earlier inconsistent laws on the same subject. Bullington v. State, 459 S.W.2d 334, 339 (Mo. 1970).

You have indicated to us one such inconsistency. The Division of Health in 1963 adopted and promulgated a regulation relating to the adulteration and misbranding of fresh meat products which defined the composition of hamburger, ground or chopped beef so as to prohibit the addition thereto of any non-beef constituent. This action was apparently taken under the authority of §§196.045 and 196.050, RSMo, an abbreviated version of the "standardized foods" provision of the Federal Food and Drug Act. 21 U.S.C.A. §341. The Federal Wholesome Meat Act contains a similar provision authorizing the Secretary of Agriculture to prescribe definitions and standards of identity or composition for meat and meat food products not inconsistent with any such standards established under the Federal Food and Drug Act. 21 U.S.C.A. §607(c).

The Secretary of Health, Education, and Welfare has not established a standard of identity for hamburger, ground or chopped beef under the Food and Drug Act. However, the Secretary of Agriculture in 1973 promulgated standards of identity for "chopped

Herbert R. Domke, M.D.

beef" or "ground beef," "hamburger," "beef patties," and "fabricated steaks" 9 C.F.R. §319.15. The standard for "beef patties" states that it is chopped, fresh or frozen beef to which may be added "binders or extenders" with or without added water so long as the product's resulting characteristics are essentially that of a meat patty. Thus, a meat or meat food product conforming to this standard with a "label" bearing the name "beef patties" and a listing of optional ingredients other than spices, flavoring, and coloring (21 U.S.C.A. §601(n)(7); 9 C.F.R. §§317.2 and 319.1) would not be misbranded under the Federal Wholesome Meat Act; and by virtue of the incorporation by reference of the Federal Meat Act's misbranding provisions into the Missouri Meat Act, we do not think it would be misbranded under Missouri law provided that its retail "labeling" uses the name "beef patty" and lists the common or usual name of each ingredient except spices, flavoring, and coloring (§196.075(9), RSMo).

The Federal Wholesome Meat Act includes the following provision:

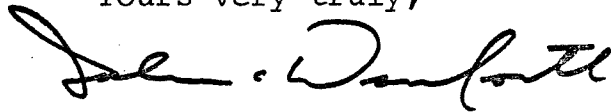
" . . . Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State . . . with respect to articles prepared at any establishment under inspection in accordance with the requirements of subchapter I of this chapter, but any State . . . may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment, . . . " 21 U.S.C.A. §678.

We interpret this provision to mean that meat and meat food products coming from plants required to be inspected under the Federal Wholesome Meat Act and thereafter held for sale to the general public by retail food establishments within this state must be determined to be adulterated or misbranded according to the definition of those terms as they are found in the Federal law and regulations and consistent definitions in the Missouri Food and Drug Law and regulations. Armour and Company v. Ball, 468 F.2d 76 (6th Cir. 1973) cert. den. 411 U.S. 981 (1973); Rath Packing Company v. Becker, 357 F.Supp. 529 (D.C. Cal. 1973); Swift & Company, Inc. v. Walkley, 369 F.Supp. 1198 (D.C. N.Y. 1973).

Herbert R. Domke, M.D.

On July 18, 1972, and pursuant to 21 U.S.C.A. §661(c), the Secretary of Agriculture designated Missouri as a state that was not enforcing its own requirements equal to those under the Wholesome Meat Act as to establishments preparing meat for use as human food. 37 Fed. Reg. 138, p. 14222. The effect of this designation is that all meat processing plants in Missouri, whether producing for interstate or intrastate commerce, are subject to federal inspection. Furthermore, by virtue of this designation, any retail establishment (e.g., grocery or restaurant) obtaining meat or meat products for resale to the general public will necessarily receive such commodities from a plant subject to federal inspection. Accordingly, it is our opinion that the Missouri Food and Drug Law still applies to meat and meat products at the retail establishment level so long as the adulteration and misbranding provisions of such law are consistent with the meaning of those terms under the Federal Wholesome Meat Act. As pointed out above, however, a meat or meat food product conforming to the ingredients of a "beef patty" must bear a label, or be accompanied by a menu, containing a list of optional ingredients other than spices, flavoring, and coloring.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

January 8, 1975

OPINION LETTER NO. 2
Answer by Letter - Burns

Honorable Ed Bohl
State Representative, District 115
c/o House Post Office
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Bohl:

This is in answer to your opinion request asking whether a fourth class city has authority through the city treasurer to invest surplus funds in savings accounts in a savings and loan association insured by the Federal Savings and Loan Insurance Corporation to the extent that the accounts are fully insured by the FSLIC even though such fourth class city has selected a banking institution as its city depository under provisions of Section 93.355, RSMo.

We enclose Opinion No. 134, rendered May 13, 1969, to Robert H. Martin, which holds that under provisions of Section 95.355, RSMo 1969, the board of aldermen of a fourth class city can select only one banking institution as a depository for city funds.

We also enclose Opinion No. 148, rendered October 5, 1970, to Zane White, holding that under the provisions of Section 369.325, RSMo, a municipality or political subdivision in this state may legally invest funds in accounts of a savings and loan association which holds a certificate of insurance from the Federal Savings and Loan Insurance Corporation. In that opinion there was no discussion of the meaning of the term "investments" and in view of the repeal of Section 396.325 and the enactment of Section 369.194, RSMo Supp. 1973, we believe it unnecessary to determine the effect of the holding in the

Honorable Ed Bohl

1970 opinion insofar as "investments" by a municipality or political subdivision are concerned.

Section 369.194.1, RSMo Supp. 1973, provides as follows:

"Savings accounts in insured associations are legal and proper investments or depositaries for fiduciaries of every kind and nature, all political subdivisions or instrumentalities of this state, insurance companies, business and nonprofit corporations, charitable or educational corporations or associations, all financial institutions of every kind and character, all pension, endowment and scholarship funds both public and private, and each and all of them may invest funds in savings accounts in such associations. The supervisor shall by regulation permit associations to pledge funds or assets in connection with the investment of public funds in savings accounts of associations, and may provide that savings accounts in associations shall be legal investments for any persons, firms, corporations or entities not herein specifically referred to."

Such section provides that savings accounts in insured associations are "legal and proper investments or depositaries" for "all political subdivisions or instrumentalities of this state." Read literally, the reference to "depositaries" does not make sense because a savings and loan "account" cannot be a depository. It is clear that the meaning of the provisions of such section relating to "depositaries" is that an insured savings and loan association is a "legal depository" for the funds of "all political subdivisions or instrumentalities of this state." We believe that it is also clear that insofar as political subdivisions and instrumentalities of the state are concerned, that when moneys of such governmental entities are placed in savings accounts in insured savings and loan associations the savings and loan associations becomes a "depository" and that there is no distinction between "investment" in a savings and loan account and selecting such savings and loan association as a "depository" of the governmental entity funds. It is therefore our view that when a political subdivision or other instrumentality of the state deposits its funds in savings accounts with insured savings and loan associations such savings and loan association becomes a "depository" of such governmental entity.

Honorable Ed Bohl

As pointed out in enclosed Opinion No. 134 - 1969, fourth class cities are authorized to select only one "depository." In view of the provisions of Section 369.194, it is our view that Opinion No. 134 should be withdrawn insofar as it requires that the "depository" be a banking institution. However, we believe that the holding in Opinion No. 134 - 1969 is correct in its holding that there be only one depository at any one time for a fourth class city. Therefore, it is our view that when a banking institution has been selected as a depository for the funds of a fourth class city, funds of such city cannot be placed in a savings and loan association as this would constitute the selection and utilization of another depository contrary to the provisions of Section 95.355, RSMo.

Very truly yours,

JOHN C. DANFORTH
Attorney General

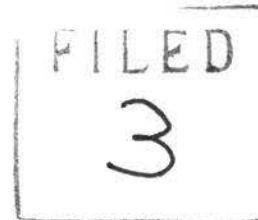
Enclosures: Op. No. 134 (Withdrawn)
5/13/69, Martin

Op. No. 148
10/5/70, White

March 11, 1975

OPINION LETTER NO. 3

Honorable Phillip H. Snowden
Representative, District 20
Room 313, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Snowden:

This letter is in response to your opinion request stated as follows:

"1. Can the County Coroner receive funds from another person firm or agency for work done in conjunction with his elective office and use this additional money to pay his secretarial help or transfer said monies to the general fund of the County?

"2. Is the County Coroner required by law to release information to insurance companies or other persons requesting information about autopsies under any circumstances? If so, under what circumstances."

Additionally, you state:

"The County Coroner of Clay County, has been authorized by LEA to receive \$25.00 per month for a study he is to perform in connection with his coroner's office. He would also like to charge insurance companies who request information about autopsy reports a fee, and use these funds to pay personnel in his office or give the money to the Clay County Court.

Phillip H. Snowden

"Also, insurance companies are making requests on his office to release information dealing with autopsies and the reports and he does not want to divulge information unless this is proper."

Chapter 58, RSMo 1969, provides the duties and responsibilities of county coroners. From your description of the study proposed to be performed by the coroner, it is apparent that such a study does not constitute a part of his official duties, nor is it incompatible with his statutory duties. This office ruled in an opinion dated November 25, 1946, to the Honorable Michael W. O'Hearn, Prosecuting Attorney of Jackson County, that the Coroner of Jackson County, Missouri, and his employees are entitled to charge and retain a fee for rendering unofficial duties not incompatible with their statutory duties. It is apparent that the study referred to in your request falls within and is governed by that opinion and it is our opinion that the coroner may perform and personally receive and retain such fees or make such use of them as he deems appropriate.

Section 58.451, RSMo 1969, provides as follows:

"1. When any person in any city of seven hundred thousand or more inhabitants, or in any county of the first or second class, dies and there is reasonable ground to believe that such person died by criminal violence or following abortion, it shall be the duty of any person having knowledge of the death immediately to notify the coroner of the known facts concerning the time, place, manner, circumstances and cause of the death. Immediately upon receipt of the notification, the coroner shall go to the dead body and take charge of the body. Upon taking charge of the dead body and before moving the body the coroner shall notify the police department of any city in which the dead body is found, or if the dead body is found in the unincorporated area of a county governed by the provisions of sections 58.451 to 58.457, the coroner shall notify the county sheriff and county highway patrol

Phillip H. Snowden

and cause the body to remain unmoved until the police department, sheriff or county highway patrol has inspected the body and the surrounding circumstances and carefully notes the appearance, the condition and position of the body and records every fact and circumstance tending to show the cause and manner of death, with the names and addresses of all known witnesses, and shall subscribe the same and make such record a part of his report.

"2. If on view of the dead body and after personal inquiry into the cause and manner of death, the coroner and police officials have reasonable ground to believe that the death was caused by criminal agency and that a further examination is necessary in the public interest, the coroner on his own authority may make or cause to be made an autopsy on the body. The coroner may on his own authority employ the services of a pathologist, chemist, or other expert to aid in the examination of the body or of substances supposed to have caused or contributed to death, and if the pathologist, chemist, or other expert is not already employed by the city or county for the discharge of such services he shall, upon written authorization of the coroner, be allowed reasonable compensation, payable by the city or county, in the manner provided in section 58.530. The coroner shall, at the time of the autopsy, record or cause to be recorded each fact and circumstance tending to show the condition of the body and the cause and manner of death.

"3. If on view of the dead body and after personal inquiry into the cause and manner of death, the coroner considers a further inquiry and examination necessary in the public interest, he shall make out his warrant directed to the sheriff of the city or county requiring him forthwith to

Phillip H. Snowden

summon six good and lawful citizens of the county to appear before the coroner, at the time and place expressed in the warrant, and to inquire how and by whom the deceased came to his death."

Section 109.180, RSMo 1969, provides as follows:

"Except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri, and those in charge of the records shall not refuse the privilege to any citizen. Any official who violates the provisions of this section shall be subject to removal or impeachment and in addition shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding one hundred dollars, or by confinement in the county jail not exceeding ninety days, or by both the fine and the confinement."

Section 109.190, RSMo 1969, provides as follows:

"In all cases where the public or any person interested has a right to inspect or take extracts or make copies from any public records, instruments or documents, any person has the right of access to the records, documents or instruments for the purpose of making photographs of them while in the possession, custody and control of the lawful custodian thereof or his authorized deputy. The work shall be done under the supervision of the lawful custodian of the records who may adopt and enforce reasonable rules governing the work. The work shall, where possible, be done in the room where the records, documents or instruments are by law kept, but if that is impossible or impracticable, the work shall be done in another room or place as nearly adjacent to the place of custody as

Phillip H. Snowden

possible to be determined by the custodian of the records. While the work authorized herein is in progress, the lawful custodian of the records may charge the person desiring to make the photographs a reasonable rate for his services or for the services of a deputy to supervise the work and for the use of the room or place where the work is done."

Section 58.451 requires that the coroner must record or cause to be recorded the facts learned from the autopsy.

It is therefore our opinion that Sections 109.180 and 109.190 are applicable to the records of coroners of class one counties and that they must be made available as provided in those sections for inspection and copying under the conditions and restrictions therein provided as we find no statutory provision to the contrary.

It is our view that the county coroner can receive funds from another person, firm or agency for work performed not required by his official duties but which is not incompatible with his official duties and may retain such money for his personal purposes and make whatever disposition of the same as he deems appropriate.

It is further our view that the county coroner in class one counties is required by the provisions of Section 109.180 and Section 109.190 to make the records compiled and maintained in his office, pursuant to Section 58.451, available for inspection and copying by any citizen of the State of Missouri under the conditions and restrictions provided for in Sections 109.180 and 109.190.

Very truly yours,

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

May 16, 1975

JOHN C. DANFORTH
ATTORNEY GENERAL

OPINION LETTER NO. 4



Honorable Jerold L. Drake
State Representative, 5th District
c/o House Post Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Drake:

This letter is in response to your request for an official opinion of this office, which request reads as follows:

"Do the requirements of the Open Meetings Law (Act 172, 77th General Assembly) apply to a meeting between a state licensing agency and a professional person licensed by that agency, and/or their respective legal counsel concerning possible suspension or surrender of the professional person's license?"

More specifically, you state you are inquiring of the situation which:

". . . occurs when a licensee is contacted by the licensing agency or its counsel to explain charges against the licensee which the licensing agency has received. The meeting can result in the surrender of a professional person's license without full evidentiary hearing."

It is our view that the meeting in question falls within the exemption of subsection 2 of Section 610.025, RSMo Supp. 1973, which provides:

Honorable Jerold L. Drake

"2. Any meeting, record or vote pertaining to legal actions, causes of action, or litigation involving a public governmental body, leasing, purchase or sale of real estate where public knowledge of the transaction might adversely affect the legal consideration therefor may be a closed meeting, closed record, or closed vote."

In reaching this conclusion we take into consideration that it has long been the public policy of this state to encourage the disposition of such matters by private conference, discussion and negotiation. Such policy is reflected by the provisions of Section 536.060, RSMo, relating to administrative actions. Any other result would, in our view, virtually destroy the privacy to which the private litigants are entitled and as a result nullify the possibility of, and accordingly, the advantages of pre-trial disposition of litigation. We do not believe that an interpretation should be given to the statute which would have an unreasonable result. State ex rel. Spriggs v. Robinson, 161 S.W. 1169 (Mo. 1913).

We therefore regard such conferences as being within the exemption relating to legal actions and conclude that such conferences are not within the public meetings law. Such meetings may be open to the public if the parties so desire but are not public meetings.

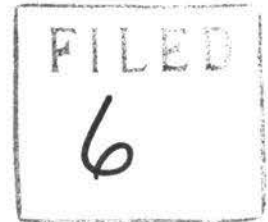
Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

January 6, 1975

OPINION LETTER NO. 6
Answer by letter-Jones



Honorable James A. Noland, Jr.
State Senator, District 33
R. F. D. 1
Osage Beach, Missouri 65065

Dear Senator Noland:

This letter is to acknowledge receipt of your request for an opinion from this office which reads as follows:

"(a) Once a member of the state employees' retirement system has become vested, can he then become a member of the public school retirement system and earn a retirement benefit from that system?

"(b) Can a member of the public school retirement system, with a vested interest therein, then become a member of the state employees' retirement system and earn a retirement benefit from that system?"

It is our understanding that your first question relating to a member of the State Employees' Retirement System who has become "vested" concerns a person who is entitled to a deferred annuity under provisions of Section 104.330, RSMo Supp. 1973, and who is no longer employed by the state.

In response to your first question, it is our view that upon a review of Chapter 169, RSMo 1969, relating to the Public School Retirement System of Missouri, there is no prohibition against such a member of the Missouri State Employees' Retirement System from becoming a member of the Public School Retirement System of Missouri and earning a retirement benefit from that system.

Honorable James A. Noland, Jr.

In response to your second question, it was held in Attorney General Opinion No. 39, Henry, 5-15-61 (copy attached), that a member of the General Assembly who is covered by the retirement or benefit fund of the Public School Retirement System of Missouri cannot also become a member of the Missouri State Employees' Retirement System. It is submitted that similar reasoning is applicable to the second question that you have presented, and it would be our opinion that a member of the Public School Retirement System, with a vested interest therein, cannot become a member of the State Employees' Retirement System and earn a retirement benefit from that system.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 39
5-15-61, Henry

SUNSHINE BILL:
COUNTY COUNCIL:
PUBLIC MEETINGS:

Luncheon meetings of either the majority party members or of the minority party members of the St. Louis County Council, at which public business is discussed, are required to be open to the public under the Sunshine Bill.

OPINION NO. 10

February 11, 1975

Honorable Maurice Schechter
State Senator, District 13
Room 427, State Capitol Building
Jefferson City, Missouri 65101



Dear Senator Schechter:

This opinion is issued in response to your request for a ruling on the question of whether weekly luncheon meetings of the majority party members of the St. Louis County Council, at which council business is discussed, are meetings required to be open under the provisions of Sections 610.010, to 610.030, V.A.M.S., commonly known as the "Sunshine Bill."

In setting out the facts which prompted this request, you state:

"The majority party members of the St. Louis County Council meet weekly, usually prior to the sessions of the Council, to discuss legislation pending. The minority party members are not permitted to attend such luncheons and the public may not attend."

In Opinion No. 330 issued December 18, 1973, to Representative Harold L. Volkmer, this office held that subcommittee meetings and meetings of the "committee of the whole" of the St. Louis County Council were "public meetings" within the meaning of Section 610.010(3), and thus were required to be open to the public by Section 610.015. Your question seeks to determine whether the weekly luncheon meetings of the majority members of the Council, at which pending legislation is discussed, are also required to be open to the public.

Honorable Maurice Schechter

Section 610.015 reads, in part, as follows:

"Except as provided in section 610.025, and except as otherwise provided by law, . . . all public meetings shall be open to the public . . ."

A "public meeting," as defined in Section 610.010(3), consists of:

" . . . any meeting, formal or informal, regular or special, of any public governmental body, at which any public business is discussed, decided or public policy formulated;"

"Public governmental body," as defined in Section 610.010(2), includes:

" . . . any constitutional or statutory governmental entity, including any state body, agency, board, bureau, commission, committee, department, division, or any political subdivision of the state, of any county or of any municipal government, school district or special purpose district, and any other governmental deliberative body under the direction of three or more elected or appointed members having rule-making or quasi-judicial power;"

To begin with, since counties are specifically mentioned in Section 610.010(2), there can be no doubt that the regular and special meetings of the full County Council are covered by the provisions of the Sunshine Bill. And, of course, this office ruled to that effect in Opinion No. 330. See Opinion No. 330, pages 2-3. That opinion went on to hold that meetings of the Council's subcommittees and executive sessions, such as meetings of the "committee of the whole" also were required to be open to the public under the provisions of the Sunshine Bill. In reaching that decision, we noted that Section 610.010(3) covers "any meeting," including informal sessions, at which ". . . any public business is discussed, decided or public policy formulated." Thus, we pointed out, there is no requirement that formal action be taken at a particular meeting in order for it to qualify as a "public meeting."

In seeking to determine the applicability of the Sunshine Bill to luncheon meetings of the Council's majority party members,

Honorable Maurice Schechter

your question goes a step beyond our previous opinion. We believe that the Sunshine Bill not only encompasses such meetings of the majority party, but encompasses similar meetings of the minority party.

As we pointed out in Opinion No. 330, it has been consistently held that open meeting laws, such as Missouri's Sunshine Bill, are remedial in nature and should be liberally construed. Laman v. McCord, 432 S.W.2d 753 (Ark. 1968); Board of Public Instruction of Broward County v. Doran, 224 So.2d 693 (Fla. 1969); Brown v. State, 245 So.2d 41 (Fla. 1971). Likewise, Missouri courts have held that in construing remedial legislation, the courts are to consider the "evil sought to be cured" and should make such construction as shall "... suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief." "... B-W Acceptance Corporation v. Benack, 423 S.W.2d 215, 218 (St.L.Ct. App. 1967).

In this case, the "evil sought to be cured" is the deliberate exclusion of the public from the decision-making processes of public governmental bodies. See Board of Public Instruction of Broward County v. Doran, supra, at 699.

In Doran the Florida Supreme Court was interpreting a statute very similar to Missouri's Sunshine Bill. Subsection (1) of Fla. Stat., §286.011 (F.S.A.), the particular provision under consideration, stated:

"All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation or any political subdivision, except as otherwise provided in the constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, regulation or formal action shall be considered binding except as taken or made at such meeting."

In interpreting the above provision, the court in Doran stated, l.c. 698:

"... The obvious intent was to cover any gathering of the members where the members deal with some matter on which foreseeable action will be taken by the board."

Honorable Maurice Schechter

Thus, in Doran the court upheld an injunction entered against the Board of Public Instruction of Broward County from holding secret, informal conferences, even though no official acts were taken at such conferences. In City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971), the court reaffirmed its position that secret meetings of any type were prohibited by Florida law.

CONCLUSION

Based on the foregoing decisions, and an examination of the provisions of Missouri's Sunshine Bill, Sections 610.010 to 610.030, V.A.M.S.,--particularly Section 610.010(3), which specifically includes informal meetings--it is our opinion that luncheon meetings of either the majority party members or of the minority party members of the St. Louis County Council, at which public business is discussed, are required to be open to the public under the Sunshine Bill.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Philip M. Koppe.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

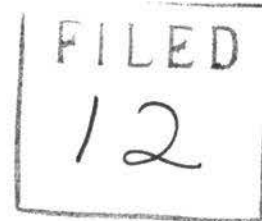
JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 330
12-18-73, Volkmer

March 11, 1975

OPINION LETTER NO. 12
Answer by letter-Card

Herbert R. Domke, M.D., Director
Missouri Division of Health
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Dr. Domke:

This official opinion is in response to your request for this office's opinion on the following:

"The Division of Health is directed by Section 192.050 RSMo to maintain various bureaus, including a bureau of laboratories, and to formulate orders and findings for the proper conduct of such bureaus. Should the services of medical laboratories operated by the Division of Health be made available to chiropractors licensed under Chapter 331 RSMo?"

You advise that the Division of Health operates medical laboratories in Jefferson City, Springfield, Poplar Bluff, and Mount Vernon. These laboratories test specimens submitted from throughout the state by physicians, hospitals, veterinarians, and public health offices as part of a various infectious, dangerous, communicable, and contagious disease program conducted by the Division.

The diseases for which specimens are submitted and laboratory tests conducted are as follows:

Meningococcal meningitis
Other bacterial meningitis
Infectious mononucleosis
Salmonellosis
Shigellosis
Infant enteritis
Food borne illness

Herbert R. Domke, M.D.

Other GI tract infections
Conjunctivitis
Skin fungus infections
Tick borne fever
Other zoonoses
Influenza
Viral pneumonia
Tuberculosis
Chicken pox
Rubella
Gonorrhea
Viral central nervous system diseases
Infectious hepatitis A
Serum hepatitis B
Rubeola
Whooping cough
Septicemia (Gram Neg.)
Septicemia (Gram Pos.)
All other bacterial infections
Impetigo
Tularemia
Rabies
Streptococcus infections
Bacterial pneumonia
Other upper respiratory illness
Fungus infections
Mumps
Syphilis

Sections 192.020 and 192.050, RSMo 1969, provide as follows:

"It shall be the general duty and responsibility of the division of health to safeguard the health of the people in the state and all its subdivisions. It shall make a study of the causes and prevention of diseases. It shall designate those diseases which are infectious, contagious, communicable or dangerous in their nature and shall make and enforce adequate orders, findings, rules and regulations to prevent the spread of such diseases and to determine the prevalence of such diseases within the state. It shall have power and authority, with approval of the director of public health and welfare, to make such orders, findings, rules and regulations as will prevent the entrance of infectious, contagious and communicable diseases into the state." (Section 192.020, RSMo 1969)

Herbert R. Domke, M.D.

"The division of health shall maintain a bureau of vital statistics, a bureau of laboratories, a bureau of communicable diseases, a bureau of food and drug inspection, a bureau of child hygiene, a bureau of public health nursing, a bureau of tuberculosis control, a bureau of cancer control, a bureau of dental health, and other bureaus as may be necessary from time to time. The division, with the approval of the director of the department, shall formulate orders and findings for the proper conduct of the bureaus." (Section 192.050, RSMo 1969)

Unless required by other statutes, we believe that these provisions delegate to the Division of Health discretion as to what laboratory services to provide and to whom these services should be provided. The only provisions which we have found compelling the Division of Health to perform certain specific laboratory tests are Section 451.050(3), RSMo 1969 (premarital serological tests for syphilis) and Section 210.030, RSMo 1969 (prenatal serological tests for syphilis) which provide:

"3. Laboratory tests shall be made free of charge by the laboratory of the division of health or by such other public health laboratories wherever maintained in the state of Missouri, upon the request of a physician or by an applicant." (Section 451.050(3), RSMo 1969)

"Every licensed physician, midwife, registered nurse and all persons who may undertake, in a professional way, the obstetrical and gynecological care of pregnant women in the state of Missouri shall, if the woman consents in the case of each woman so attended, take or cause to be taken a sample of venous blood of such woman at the time of the first examination, or not later than twenty days after said first examination, and subject such sample to an approved and standard serological test for syphilis. An approved and standard test for syphilis shall mean a test made in a laboratory approved by the division of health of the department of public health and welfare. Such test shall be made free of

Herbert R. Domke, M.D.

charge by the division of health on request."
(Section 210.030, RSMo 1969)

In light of Section 334.021 which provides that whenever other statutes of this state use the term "physician," it shall be construed to mean physicians and surgeons licensed under the provisions of Chapter 334, we are of the opinion that the legislature did not intend the word "physician" in the above two sections to include a licensed chiropractor.

We have not been able to find any statute which either authorizes or requires the Division of Health to perform laboratory tests at the request of a licensed chiropractor. But, as we understand, the primary purpose of maintaining and operating the various laboratories is as an adjunct to the state's efforts at controlling contagious and communicable diseases. Since the Division has the discretion as to how it is going to operate the laboratories, we are of the opinion that the Division, regardless of the source, has the authority to test any specimen submitted to it to determine whether a contagious or communicable disease is present. We further believe that it is within the discretion of the Division of Health to decide to whom the results of the various laboratory tests performed on any sample submitted are to be divulged.

Yours very truly,

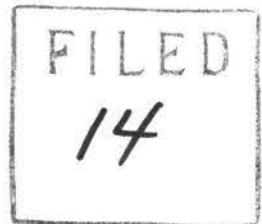
JOHN C. DANFORTH
Attorney General

February 21, 1975

OPINION LETTER NO. 14

Answer by Letter - Nowotny

Mr. Mark L. Edelman
Deputy Commissioner of Administration
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Edelman:

This is in response to your request for an official opinion concerning the question whether the State of Missouri is required to withhold a part of an employee's earnings to pay maintenance under the provisions of Section 452.350, RSMo Supp. 1973, and, if so, whether the State of Missouri is entitled to the one dollar deduction from each payment as provided in said section.

Section 452.350, RSMo Supp. 1973, provides as follows:

"The court may order the person obligated to pay support and maintenance to make an assignment of a part of his periodic earnings or other income to the person entitled to receive the payments or to the circuit clerk as trustee for such person. The assignment is binding on the employer or other payor of the funds two weeks after service upon him of notice that it has been made. The payor shall withhold from such earnings or other income the amount specified in the assignment and shall transmit the payments to the person specified in the order. Section 432.032, RSMo,* or any other law or statute to the contrary notwithstanding, the

*Apparently an erroneous citation; no such statute number exists in RSMo; probably should be 432.030, RSMo.

Mr. Mark L. Edelman

payor may deduct from each payment a sum not exceeding one dollar as reimbursement for costs. An employer shall not discharge or otherwise discipline an employee as a result of a wage or salary assignment authorized by this section."

The question, of course, is one of legislative intent as to whether the use of the term "employer" includes the State of Missouri. In determining this question of legislative intent, it is important to review the common law rules concerning assignment of wages. The general rule is that an assignment of future wages is void. 6 C.J.S. Assignments, §20. Furthermore, the assignment by a public officer of unearned wages is void as against public policy. 6 C.J.S. Assignments, §21.

The Supreme Court of Missouri adopted the general rule concerning assignments by public officers when it held that the assignment of wages by a post office employee is against public policy. State v. Williamson, 23 S.W. 1054 (Mo. 1893). See also State ex rel. Kansas City Loan Guarantee Co. v. Kent, 71 S.W. 1066 (K.C.Ct.App. 1903); and Nelson v. Townsend, 111 S.W. 894 (K.C.Ct.App. 1908).

The common law rule against the assignment of unearned wages has been codified in Section 432.030, RSMo, providing as follows:

"All assignments of wages, salaries or earnings must be in writing with the correct date of the assignment and the amount assigned and the name or names of the party or parties owing the wages, salaries and earnings so assigned; and all assignments of wages, salaries and earnings, not earned at the time the assignment is made, shall be null and void."

Accordingly, it appears that Section 452.530 is an exception to the general rule as stated in the cases cited and also Section 432.030. Again, the question is whether this exception to such general rules was meant to apply to the state as an employer.

It is our opinion that for the legislature to reverse the general rule as it applies to the state, the legislature would do so with language specifically naming the state as an employer. Accordingly, it is our opinion that Section 452.530 does not apply to the State of Missouri. In an analogous situation the Supreme Court of Missouri held that the state cannot be sued in

Mr. Mark L. Edelman

garnishment unless the state has explicitly allowed such suit. Nacy v. LePage, 111 S.W.2d 25 (Mo. 1937). The legislature, after this case was decided, enacted Section 525.310, RSMo, explicitly making the state subject to writ of sequestration.

Therefore, we do not find any intent on the part of the legislature in Section 452.350 to make such provisions applicable against the state.

It is therefore our view that the State of Missouri is not an employer under the provisions of Section 452.350, RSMo Supp. 1973, relating to assignment of wages in domestic relation cases and therefore is not subject to order by a court to assign a part of the earnings of a state employee under such statute.

Very truly yours,

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH
ATTORNEY GENERAL

January 29, 1975

OPINION LETTER NO. 16

Mr. Lee E. Norbury, Executive Secretary
State Soil and Water Districts Commission
705 Hitt, University of Missouri
Columbia, Missouri 65201

Dear Mr. Norbury:

We have received the following communication from the Office of Counsel of the Missouri State Highway Commission which we believe eliminates the need for a detailed answer to your question asking whether a sign on the highways of Missouri maintained by a soil and water conservation district constitutes a directional or other official sign within the meaning of Section 226.520, RSMo Supp. 1973:

" . . . There has been a change in policy of the Highway Commission and the change would make the soil conservation signs eligible for a permit within their own district. The permits must be applied for from the regional district office of the Highway Department. Furthermore, it has been recommended by this office and by the Division of Maintenance and Traffic that these signs would have to qualify under the directional signs provision. . . ."

If you need any further information in this respect, we will be pleased to assist you.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

January 15, 1975

OPINION LETTER NO. 17

Honorable J. William Holliday
Prosecuting Attorney
Clark County
220 North Morgan Street
Kahoka, Missouri 63445

Dear Mr. Holliday:

This letter is in response to your request for an opinion on the question whether a Missouri bank violates the law when it charges on a loan to a corporation a rate of interest which is in excess of the lawful rate that can be charged an individual when the stockholders of the corporation are required to sign the note individually or when the stockholders are required to sign the note individually as guarantors.

With respect to your question, we assume that the proceeds of the loan were paid to the corporation by the lender and that the individuals signing the note did so for the purpose of lending their credit to the corporation. Consequently, the individual signers are accommodation parties under the Uniform Commercial Code, Section 400.3-415, RSMo 1969.

The Missouri Usury Laws do not apply to corporations (Sections 351.385(7), 408.060, RSMo 1969, and 408.035, C.C.S. 3 H.S. H.C.S.S.S.B. 1, Second Extraordinary Session, 77th General Assembly). Section 408.060 provides in part:

". . . no corporation shall, . . . interpose the defense of usury in any such action, nor shall any bond, note, debt, contract or obligation of any corporation or any security therefor be set aside, impaired or adjudged

Honorable J. William Holliday

invalid by reason of the rate of interest
which the corporation may have paid or agreed
to pay hereon."

Section 408.035, Senate Bill No. 1, provides in part:

"Notwithstanding the provisions of section
408.030, it is lawful for the parties to agree
in writing to any rate of interest in connec-
tion with any

(1) Loan to a corporation,"

Therefore, as to the corporation it is clear that the notes mentioned in your question is not usurious. As to the individuals signing as accommodation parties, we find no Missouri cases precisely on point. However, the weight of authority in other jurisdictions holds that where a state statute denies a corporation the right to plead the defense of usury, an accommodation endorser or other guarantor or surety of a corporate obligation may not defend on the grounds of usury. See annotation 63 A.L.R.2d §12. Therefore, this office is of the opinion that where individuals have signed a corporation note as accommodation parties, the courts of the state would not allow them to assert that the note is usurious.

Very truly yours,



JOHN C. DANFORTH
Attorney General

STATE EMPLOYEES:
TORT DEFENSE FUND:
CONSERVATION COMMISSION:

The Conservation Commission may not pay a final judgment for actual or punitive damages obtained against one of its enforcement officers as a result of his conduct while he was in the actual performance of his enforcement duties.

OPINION NO. 21

January 29, 1975

Mr. Carl R. Noren, Director
Department of Conservation
Post Office Box 180
Jefferson City, Missouri 65101



Dear Mr. Noren:

This letter is in response to your opinion request in which you ask:

"May the Conservation Commission pay a final judgment for actual and punitive damages obtained against one of its enforcement officers as a result of his conduct while he was in the actual performance of his enforcement duties?"

Because of the divergent nature of actual and punitive damages, we will consider this as a request which asks two questions, to-wit:

I.

May the Conservation Commission pay a final judgment for actual damages incurred by one of its enforcement officers in the performance of his duties?

II.

May the Conservation Commission pay a final judgment for punitive damages incurred by one of its enforcement officers in the performance of his duties?

At the outset, it should be noted that this opinion deals only with the situation where the judgment obtained was rendered

Mr. Carl R. Noren

in a civil cause brought against the agent and not against the Department of Conservation.

I.

The Missouri legislature, by the enactment of the "Tort Defense Fund" (Sections 105.710, et seq., RSMo Supp. 1973), has determined that the state will reimburse certain agents or officers for certain final judgments obtained against them for acts performed in connection with their official duties. Prior to the 1973 revision, Section 105.710(1) read as follows:

"As part of the compensation to be paid to the director of the department of corrections, the director of the division of health, the director of the division of mental diseases and other officers, employees and agents of the department of corrections, the division of health and the division of mental diseases the comptroller is authorized to pay from the 'Tort Defense Fund', which is hereby created, all final judgments awarded in courts of competent jurisdiction to any claimant against the aforesaid officers, employees, and agents, for acts arising out of and performed in connection with their official duties in behalf of the state. Payment shall be limited to a maximum of one hundred thousand dollars for all claims arising out of the same act except that no payment shall be made for any claim which arises because of or in connection with the operation of a motor vehicle either privately or publicly owned."

This subsection did not name the Missouri Conservation Commission as one of the agencies entitled to participate in the "Tort Defense Fund." Instead, it specifically enumerated the Department of Corrections and Divisions of Health and Mental Diseases as those agencies to benefit from its coverage. In 1973 this subsection was amended to read as follows:

"1. As part of the compensation to be paid to the director of the department of corrections, the director of the department of public health and welfare, the director of the division of health, the director of the division of welfare, the curators and regents of

Mr. Carl R. Noren

public institutions of higher education which award baccalaureate degrees, the director of the division of mental health, the adjutant general and other officers, employees and agents of the department of corrections, the division of health, the division of welfare, and the division of mental health, and members of the Missouri national guard while on active duty for the state of Missouri, the comptroller is authorized to pay from the 'Tort Defense Fund', which is hereby created, all final judgments awarded in courts of competent jurisdiction to any claimant against the aforesaid officers, employees, agents, and members of the Missouri national guard, for acts arising out of and performed in connection with their official duties in behalf of the state. Payment shall be limited to a maximum of one hundred thousand dollars for all claims arising out of the same act, except that no payment shall be made for any claim which arises because of or in connection with the operation of a motor vehicle either privately or publicly owned."
(emphasis added)

Again, in this revision, employees of the Missouri Conservation Commission were not named to receive the benefit of its coverage.

It is a general principle of statutory construction that the mention of one thing implies the exclusion of another. (For an exhaustive annotation on this "rule of exclusion," see: 73 Am.Jur.2d Statutes §212 and the citations collected thereunder.) As exceptions in a statute strengthen the force of law in cases not excepted, so enumerations weaken it in cases not enumerated. Marx & Haas Jeans Clothing Co. v. Watson, 67 S.W. 391 (Mo.Banc 1902). Hence, a statute which mandates a thing to be done in a given manner or by certain persons or entities normally implies that it shall not be done in any other manner or by any other persons or entities. Botany Worsted Mills v. United States, 278 U.S. 282, 49 S.Ct. 129, 73 L.Ed. 379 (1929). Although this rule of exclusion is not a rule of law, it does provide the preferred construction of a statute where its coverage is specifically extended to certain persons, classes, or entities by enumeration. State v. Bengsch, 70 S.W. 710 (Mo.Banc 1902); Citizens' Nat. Bank of Kansas City v. Graham, 48 S.W. 910 (Mo.Banc 1898); Henderson v. Koenig, 68 S.W. 72 (Mo.Banc 1902).

Mr. Carl R. Noren

It is submitted that, from the plain language of Sections 105.710, et seq., that it was the clear intent of the legislature to give only those agencies named in subsection (1) the privilege of reimbursing their officers and agents for successful tort judgments obtained against them. This contention is supported not only by the rule of exclusion, but also by the 1973 revision of that subsection which enlarged the group of agencies covered by the fund, yet continued to enumerate the individual entities so named. Therefore, it seems apparent that to extend the coverage of the Tort Defense Fund would be unwarranted and contrary to the obvious legislative intent expressed in enacting this law.

Because of this, it is the opinion of this office that the Missouri Conservation Commission, not being within the state's Tort Defense Fund, may not reimburse its agents or officers for an actual damage judgment obtained against them for their acts in connection with the performance of their duties.

II.

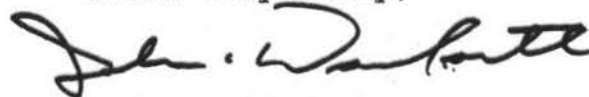
The second question posed in this inquiry need not be reached since the contentions asserted in Part I of this opinion would preclude the Conservation Commission from paying a punitive damage award obtained against one of its enforcement agents for his acts in connection with the performance of his duties. Further, even assuming, arguendo, that the Conservation Commission could pay a judgment under the provisions of the "Tort Defense Fund," this office has explicitly held that punitive damages could not be paid from this fund, as such payment would violate public policy (Attorney General's Opinion Letter No. 46, Sartorius, May 28, 1974).

CONCLUSION

Therefore, it is the opinion of this office that the Conservation Commission may not pay a final judgment for actual or punitive damages obtained against one of its enforcement officers as a result of his conduct while he was in the actual performance of his enforcement duties.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Timothy Verhagen.

Yours very truly,



JOHN C. DANFORTH
Attorney General

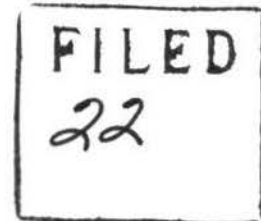
Enclosure: Op. Ltr. No. 46
5-28-74, Sartorius

April 15, 1975

OPINION LETTER NO. 22

Answer by Letter - Thomas

Mr. George M. Camp, Director
Missouri Department of Corrections
911 Missouri Boulevard
Jefferson City, Missouri 65101



Dear Sir:

Your recent request for an official opinion is as follows:

May the Department of Corrections retain \$355,750.81 in its Working Capital Revolving Fund, thus making the adjusted balance of the non-reserved retained earnings of \$955,750.81 exceed the \$600,000.00 statutory limit.

Restated, the question is whether the statutory maximum refers to the net cash balance or the retained earnings account.

Section 216.191(4), RSMo 1969 provides, in part, that:

"That portion of the working capital revolving fund exceeding six hundred thousand dollars at the end of each fiscal year shall be transferred to the general revenue fund. Twenty percent of the amount credited to the fund as net profit during each fiscal year may be used during the following fiscal year for expansion and improvement of the prison industry and prison farm programs as the director of the department of corrections requires."

Mr. George M. Camp, Director

As is evident, from the above-quoted text, the applicable statutory provision does not specify what account is to be the focal point of the dollar limitation.

The predecessor of this provision is Section 216.191(5), RSMo 1959 which reads, in part:

"At the end of any fiscal year when the amount previously credited to the working capital revolving fund as net profits from the industrial and farm operations of the department exceeds three hundred thousand dollars, the amount in excess of this sum shall be transferred to the funds of the several institutions in the department. . . ."

The monetary limitation, in this provision, is directed toward the aggregate profits. The legislative objective was clearly to control the amount of profits kept in the revolving fund itself.

In construing the statutes, it is essential to effectuate and implement the legislative objectives and purposes. Stewart v. Johnson, 398 S.W.2d 850 (Mo. 1966); Gladstone Special Road District of Clay County v. County of Clay County, 293 S.W.2d 351 (Mo. 1956). The only substantive changes brought about by the enactment of Section 216.191(4) are the increase in the dollar limit from \$300,000 to \$600,000 and the manner in which the excess funds are to be distributed. Neither the overall objective, nor the reference point of the monetary limitation is changed. That is, the \$600,000 limitation refers to the aggregate or accumulated profits of the revolving fund.

Moreover, to employ the cash account as the focal point of the limitation would bring about a result which would serve no purpose. A year-end limitation on the cash account of the revolving fund accomplishes nothing whatsoever. Such a limitation could be effectively avoided by simply not collecting on accounts receivable and/or satisfying outstanding indebtedness from the cash account, thereby depleting the account prior to year-end auditing. The limitation, then, would have no meaning or purpose. In statutory construction, an absurd or meaningless result must be avoided. State ex rel. Gass v. Gordon, 181 S.W. 1016 (Mo. Banc 1915); State ex rel. Thomason v. Roth, 372 S.W.2d 94 (Mo. 1963).

Mr. George M. Camp, Director

This office is of the opinion that the \$600,000 limitation in Section 216.191(4), RSMo 1969 is directed toward the retained earnings or accumulated net profits account. Thus, the Department of Corrections must transfer to the general revenue the amount by which the retained earnings account exceeds the statutory limit. Therefore, the Department of Corrections cannot retain \$355,750.81 in its Working Capital Revolving Fund, since said sum is the amount by which the non-reserved retained earnings account exceeds the statutory limit of \$600,000.

Very truly yours,

JOHN C. DANFORTH
Attorney General

SCHOOLS: No valid contract existed between a teacher
TEACHERS: and a board of education when the teacher
failed to secure before the beginning of
school the specific certificate that was an express condition of the
contract. Since there was no valid contract between the teacher and
the school board, the teacher's certificate of license to teach cannot
be revoked because no valid contract was annulled when the teacher
failed and refused to teach in a position for which he did not
have a valid certificate of license.

OPINION NO. 24

May 12, 1975

Charles J. McClain, President
Northeast Missouri State University
104 Baldwin Hall
Kirksville, Missouri 63501



Dear Mr. McClain:

This official opinion is issued in response to your request for a ruling on the validity of a written contract entered into with a teacher holding only a certificate to teach physical education who agreed to teach social studies in a Missouri public school on the express condition that he "must have a clear certificate in social studies by the time school begins," if the teacher fails to secure the certificate authorizing him to teach social studies.

We assume, for purposes of this opinion, that no provisional or permanent certificate had been issued to the teacher. At the start of the school year, he began teaching social studies without securing a certificate to teach social studies, although the board did not formally waive its condition of employment. After approximately three weeks of teaching he resigned. The board refused to accept his resignation. The board has requested that Northeast Missouri State University, as the issuing institution, revoke the teacher's license for breach of contract. The foregoing facts will be used as the basis for this opinion.

The following statutes are relevant to a determination of whether or not the teacher's license should be revoked.

A license to teach is required:

"No person shall be employed to teach
in any position in a public school until he
has received a valid certificate of license

Charles J. McClain, President

entitling him to teach in that position."
(Section 168.011, RSMo 1969)

Several grounds exist for the revocation of a license to teach:

"A certificate of license to teach may be revoked by the authority which issued the certificate upon satisfactory proof of incompetency, cruelty, immorality, drunkenness, neglect of duty, or the annulling of a written contract with the local board of education without the consent of the majority of the members of the board which is a party to the contract. . . ." (Emphasis added) (Section 168.071, RSMo Supp. 1973)

A teacher without a license is subject to certain penalties:

"Any teacher who enters a public school in this state to teach, govern and discipline the school who does not have a valid certificate of license entitling him to teach therein or who has not been legally employed by the school board of the district to teach therein, forfeits all right, title and claim to any compensation therefor, and is guilty of a misdemeanor and punishable by a fine not to exceed one hundred dollars. Any director who endorses or encourages the teacher in such unlawful conduct is guilty of a misdemeanor and punishable by a like fine." (Section 168.081, RSMo 1969)

See also The School Administrators Handbook, Missouri State Board of Education Publication No. 20-H (1969):

"A teacher's certificate is a license required by law to teach, govern and discipline students in the public schools of Missouri. A teacher's certificate indicates that one is trained as a teacher and is qualified for a definite teaching and/or school administrator's position." Id. at 79.

"A person without a teaching certificate may be employed, provided he becomes legally certificated prior to the date he starts to teach." Id. at 81.

Charles J. McClain, President

A teacher's contract is similar to other contracts:

"The general law of contracts applies in the construction of teachers' contracts. . . ."
Adamick v. Ferguson-Florissant School District, 483 S.W.2d 629, 631 (Mo. Ct.App. at St.L. 1972)

". . . There is no question but that in Missouri a teacher's contract must be in writing and authorized by the board. Sections 432.070 and 163.080 [now § 168.101]; . . ."
Lynch v. Webb City School District No. 92, 418 S.W.2d 608, 613 (Spr.Ct.App. 1967)

An appellate court has interpreted an earlier version of Sections 168.011 and 168.081, RSMo 1969:

"We do not think, taking sections 8021 and 8022 [now Sections 168.011 and 168.081], to be read together, they mean that the teacher must have a certificate of qualification at the time of making a contract to teach school in the future. The object of the statute is that the qualification may exist during the term of the employment. The language of the statute is that, 'no teacher shall be employed,' and has reference to the employment and not to the contract for employment. It means that he shall not be engaged in teaching without the required certificate, and the following section imposes a forfeiture and punishment if he does so." (Emphasis added) Crabb v. School District No. 1, 93 Mo.App. 254, 260 (K.C.Mo.App. 1902)

See also Opinion No. 57, Marr, May 11, 1938, in which we held that:

"A teacher may be employed who before teaching school under her contract will become legally qualified by the proper certificate although at time of employment was not legally qualified."

Based on the foregoing authorities, we conclude that a contract to teach is subject to the condition imposed by law that the teacher must have a valid certificate. As previously noted, the

Charles J. McClain, President

teacher in question prior to the beginning of school obtained neither a valid temporary nor a permanent certificate. The condition to employment having failed, there was no agreement which could be breached. Therefore, Section 168.071, RSMo Supp. 1973, does not provide a means for revoking this teacher's license because no written contract was annulled.

CONCLUSION

It is the opinion of this office that no valid contract existed between a teacher and a board of education when the teacher failed to secure before the beginning of school the specific certificate that was an express condition of the contract. Since there was no valid contract between the teacher and the school board, the teacher's certificate of license to teach cannot be revoked because no valid contract was annulled when the teacher failed and refused to teach in a position for which he did not have a valid certificate of license.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hortense K. Snower.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 57
Marr, 5-11-38

DEPARTMENT OF SOCIAL SERVICES:
REORGANIZATION ACT:
MERIT SYSTEM:

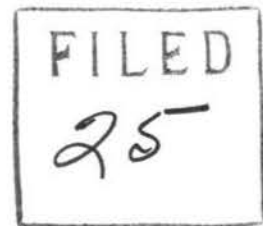
No merit status can be lost
by the transfer or realignment
of a unit or position under
the Reorganization Act where

the essential identity of the position or unit is retained and
the position or unit was within merit coverage on the effective
date of the Act. A position which was subject to the provisions
of the merit system law on the effective date of the Reorganiza-
tion Act cannot be named as one of three "exempt" positions by
a division director under Section 13.1 of that Act.

OPINION NO. 25

February 28, 1975

Mr. Mark L. Edelman
Deputy Director
Office of Administration
State Capitol Building, Room 120
Jefferson City, Missouri 65101



Dear Mr. Edelman:

This is in response to your questions as stated:

- "(a) Can merit status be lost by transfer of a unit or position from one department to another or realignment with a department under reorganization as long as the position or unit retains its identity (functions, duties, responsibilities, etc.) to a substantial degree.
- "(b) In the Department of Social Services, where three exempt positions can be named in each 'division', can a position which is identified as one which was previously subject to the provisions of the Merit System Law be named as one of the three exempt positions and the incumbent thereof removed from merit coverage? Or, does the continuity of merit coverage provision (Section 1.6(8) of the Reorganization Act) apply?"

Mr. Mark L. Edelman

I

The purpose of the Omnibus State Reorganization Act of 1974, C.C.S.H.C.S.S.C.S.S.B. No. 1, First Extraordinary Session, 77th General Assembly (hereinafter referred to as Reorganization Act), as stated in Section 1.4 of that law, was to:

" . . . provide for the improved accountability in performance of service to the citizens of the state and for the most efficient and economical operations possible in the administration of the executive branch of state government. . . ."

The Reorganization Act was not enacted to alter or terminate any merit coverage provided state employees, as was clearly expressed in Section 1.6(8), as follows:

"Nothing in this act shall be construed so as to remove any state agency or unit thereof or any position of employment from coverage under the provisions of the merit system law if the agency or position was covered by that law on the effective date of this act."

In answer to your first question, it is submitted that the language of Section 1.6(8), quoted above, controls the status of any position or unit transferred or realigned to a new organizational entity if such position or unit was previously within the coverage of the merit system and retains its essential identity. Any holding to the contrary would be in direct contravention to the plain intent of the legislature when it included Section 1.6(8) within the language setting forth the scope of this Act.

Because of this, it is the opinion of this office that no merit status can be lost by the transfer or realignment of a position or unit under the Reorganization Act where the essential identity of the position or unit is retained and the position or unit was within merit coverage on the effective date of the Act.

II

Section 13.1 of the Reorganization Act provides as follows:

" . . . All employees of the department of social services shall be covered by the provisions of chapter 36, RSMo, except the director of the department and his secretary, all

Mr. Mark L. Edelman

division directors and their secretaries,
and no more than three additional positions
in each division which may be designated
by the division director."

Your second question asks whether, under Section 13.1, quoted above, a position which was previously within the merit system can be named as one of three "exempt" ones by a division director, therein removing the incumbent from merit coverage in apparent conflict with Section 1.6(8) of the Reorganization Act, quoted above.

It is the view of this office that Sections 1.6(8) and 13.1 are entirely reconcilable if the latter section is construed to mean that a division director can name a position as an "exempt" one only if it was not within the merit system on the effective date of the Reorganization Act. This interpretation would be in conformity with the preferred rule of construction that various provisions of a statute are to be read to avoid conflict when possible (See, e.g., State ex rel. Dean v. Daues, 14 S.W.2d 990 (Mo. 1928) and would also be in agreement with a prior opinion of this office in which we held that the legislature, in enacting Section 1.6(8) of the Reorganization Act, intended that positions which had merit status on the effective date of the Act remain under the merit system. (Addendum to Opinion of Attorney General, No. 220, Bond, 1974).

Further, it should be noted that this interpretation would not render the exemption privilege meaningless since it has been previously held by this office that the Director of the Department of Social Services could create new divisions and staffing positions under a departmental plan, and the language of Section 13.1 would be applicable to the new divisions created thereunder. (Attorney General Opinion Letter No. 80, Graham, 1975). By clear implication then, the exemption privilege would have effect in staffing such new positions, as they would not have been within the merit system on the effective date of the Reorganization Act.

Therefore, in answer to your second question, it seems apparent that the three positions in each division of the Department of Social Services authorized to be exempted from the merit system by Section 13.1 of the Reorganization Act do not include those positions which were within merit coverage on the effective date of the Act and such positions retain their merit status.

CONCLUSION

It is the opinion of this office that no merit status can be lost by the transfer or realignment of a unit or position under

Mr. Mark L. Edelman

the Reorganization Act where the essential identity of the position or unit is retained and the position or unit was within merit coverage on the effective date of the Act.

It is the further opinion of this office that a position which was subject to the provisions of the merit system law on the effective date of the Reorganization Act cannot be named as one of three "exempt" positions by a division director under Section 13.1 of that Act.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Timothy Verhagen.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth".

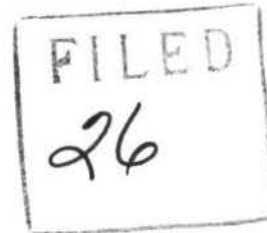
JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 220
6-11-74, Bond

Op. Ltr. No. 80
2-6-75, Graham

March 5, 1975

OPINION LETTER NO. 26
Answer by Letter - Jones



Honorable Robert O. Snyder
State Representative, 95th District
State Capitol Building, Room 204
Jefferson City, Missouri 65101

Dear Representative Snyder:

This letter is to acknowledge receipt of your request for an opinion from this office which reads as follows:

"Whether certain 'premium' compensation paid to a teacher of a School District, under a policy adopted by the District's Board of Education, is to be included in the teacher's compensation in determining his final average salary under The Public School Retirement System of Missouri and whether a sum equal to 8% of such 'premium' compensation must be paid into the retirement fund by both the teacher and the District. There is a difference of opinion between the School District and The Public School Retirement System."

In connection with the above, it is our understanding that the Public School Retirement System of Missouri has expressed strong disagreement with the views of the school district on the issue whether "premium compensation" for early retirement is to be considered by the Retirement System in determining the retirement compensation of a teacher. Therefore, since this office is required under the provisions of subsection 20 of Section 169.020, RSMo Supp. 1973, to be the legal advisor to the board of trustees of the Retirement System and represent the Board in all legal proceedings, and in view of the position the board has taken,

Honorable Robert O. Snyder

which we believe has a great deal of merit, we respectfully decline to render an opinion on the question whether "premium compensation" for early retirement is to be considered in determining the final average salary of a teacher by the Public School Retirement System of Missouri.

We do not in this letter pass on the question of the authority of a school district board to make "premium" payments for early retirement of teachers.

Very truly yours,

JOHN C. DANFORTH
Attorney General

CITIES:
COUNTIES:
CITY PARKS:
RECREATION:
FEDERAL GRANTS:
WATERSHED DISTRICTS:
COOPERATIVE AGREEMENTS:
UNIFORM RELOCATION ASSISTANCE ACT:

(1) The city of Holden may contribute funds to a multi-purpose watershed protection project six miles outside the city limits which includes recreational facilities pursuant to Section 278.145, RSMo, and (2) the city of Holden, Missouri, Johnson County, Missouri, and the South Fork of the Blackwater River Watershed Subdistrict have the authority to make relocation assistance payments pursuant to 42 U.S.C. §§ 4601, et seq.

OPINION NO. 27

March 24, 1975

Mr. James L. Wilson, Director
Department of Natural Resources
Post Office Box 176
Jefferson City, Missouri 65101



Dear Mr. Wilson:

This is in response to your request for an opinion concerning the following questions:

- "1. Does the City of Holden, Missouri; County Court of Johnson County, Mo.; and the South Fork of the Blackwater River Watershed Subdistrict have the authority under sections 523.200, 523.205, and 523.210 to make payments for relocation assistance specified by the Uniform Relocation and Advisory Assistance Act, 42 U.S.C. 4601-4655?
- "2. Does the City of Holden, Missouri, have the authority to sponsor a recreation development which is approximately 6 miles from the city limits?"

We will consider your second question first because it must be established that the city of Holden has authority to participate in this project before considering whether it may pay relocation assistance, which is a requirement of federal law (42 U.S.C. §§ 4601, et seq.) for all entities found otherwise eligible to participate.

Mr. James L. Wilson

According to a document that the United States Department of Agriculture provided this office entitled "Revised Watershed Work Plan Agreement" dated July, 1972, a water supply structure is planned approximately six miles from Holden, Missouri. This structure will serve several purposes including watershed protection, flood control, and recreation. Your question asks whether the city of Holden has the authority to "sponsor" this project. The plan, previously mentioned, contains the following caption:

"REVISED WATERSHED WORK PLAN AGREEMENT

between the

SOIL AND WATER CONSERVATION DISTRICT OF JOHNSON COUNTY

SOUTH FORK OF BLACKWATER RIVER WATERSHED SUBDISTRICT

JOHNSON COUNTY COURT

CITY OF HOLDEN, MISSOURI

MISSOURI WATER RESOURCES BOARD

* * *

State of Missouri

and the

Soil Conservation Service
United States Department of Agriculture"

We assume that the city of Holden is within the Soil and Water Conservation District of Johnson County. We further assume that by "sponsor" you mean the contribution of funds, or other assets, of the city to the project. It is our further understanding that the city plans to develop and operate some recreational facilities at this project.

Section 278.145, RSMo, states:

"The county court of any county or the governing body of any city, town or village in which a soil and water conservation district lies in whole or in part may cooperate with the supervisors of the district in carrying out the purposes of the district program, and in the event the county court or governing body finds that

Mr. James L. Wilson

the benefits accruing to the county or municipal area by reason of the program of the soil and water conservation district justify such action, the county court or governing body may contribute money, services or the use of equipment to the district."

This provision appears to give counties and cities broad authority to participate in soil and water conservation district projects which may affect the city or county.

Since the Soil and Water Conservation District of Johnson County is a sponsoring local organization of this project, it is our view that Section 278.145 is applicable. Therefore, it is our view that the city of Holden, Missouri, may contribute "money, services or the use of equipment" to the project.

Concerning your first question, enclosed are Opinion Letter No. 314 issued September 29, 1971, to Robert L. Dunkeson and Opinion Letter No. 37 issued December 13, 1973, to N. William Phillips. Both letters indicate that Sections 523.200 to 523.215, RSMo Supp. 1973, are not applicable when the project in question involves federal funds. Both letters, however, also note that Article III, Section 38(a), Missouri Constitution, authorizes the contribution, by state agencies or political subdivisions of the state, of relocation assistance that is necessary as a condition to receiving federal funds.

Clearly, the city of Holden and the county of Johnson are political subdivisions of the state. This office has previously held that a soil and water conservation subdistrict is an agency of the state. In Attorney General's Opinion No. 304 issued August 22, 1967, to Lee E. Norbury, we stated, at page 7:

"It appears, therefore, that soil and water conservation subdistricts have the power to impose taxes and are agencies of the state.
. . ."

Based on this authority, it is our view that the city of Holden, the county court of Johnson County, and the South Fork of the Blackwater River Watershed Subdistrict have the authority to make said payments for relocation assistance.

CONCLUSION

It is the opinion of this office that (1) the city of Holden may contribute funds to a multi-purpose watershed protection project

Mr. James L. Wilson

six miles outside the city limits which includes recreational facilities pursuant to Section 278.145, RSMo, and (2) the city of Holden, Missouri, Johnson County, Missouri, and the South Fork of the Blackwater River Watershed Subdistrict have the authority to make relocation assistance payments pursuant to 42 U.S.C. §§ 4601, et seq.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Andrew Rothschild.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 133
12-6-66, Kiser

Op. Ltr. No. 314
9-29-71, Dunkeson

Op. Ltr. No. 37
12-13-73, Phillips

May 12, 1975

OPINION LETTER NO. 28
Answer by Letter - Verhagen

Mr. Edward A. Godar
Director, Personnel Division
Office of Administration
117 East Dunklin Street
Jefferson City, Missouri 65101



Dear Mr. Godar:

This letter is in answer to your request pertaining to the suspension, demotion or dismissal of state civil service employees. For the purposes of this opinion, your question has been summarized into the following query:

"Is the arrest and charge of a felony or misdemeanor, of which the employee has yet to be convicted, sufficient for suspension or dismissal under Rule 13.2 of the Rules and Regulations of the Personnel Advisory Board, where the employee's culpable conduct is not directly related to job performance?"

This opinion will deal only with that conduct of the employee which is not job-related.

Section 36.370, House Bill No. 8, First Extraordinary Session, 77th General Assembly, states in part that:

"An appointing authority may, for disciplinary purposes, suspend without pay any employee in his division for such length of time as he considers appropriate, not exceeding twenty calendar days in any twelve-month period. . . ."

Mr. Edward A. Godar

Rule 13.2 of the Missouri State Personnel Advisory Board provides, inter alia, that a civil service employee may be discharged or suspended if:

"(g) [He] has been convicted of a felony,
or of a misdemeanor involving moral turpitude;
. . ." (Emphasis supplied).

Without reaching the question of what constitutes a crime involving moral turpitude, it is our opinion that Section (g), requires that an employee be convicted of a crime before he may be disciplined under that section. We feel such a conclusion follows from the plain language of the section itself, and from the judicial decisions interpreting civil service law.

When specific grounds for removal or suspension are established, they are to be strictly construed. State ex rel. Hardie v. Coleman, 155 So. 129, 115 Fla. 119 (1934). When removal or suspension is based on the commission of a crime, it must be shown that the employee was actually convicted of the crime before disciplinary action is warranted. State v. Henderson, 146 So. 456, 166 Miss. 530 (1933); Smith v. Commonwealth, 113 S.E. 707, 134 Va. 589 (1922).

In addition, it is submitted that Section (g) of Rule 13.2 is, on its face, devoid of ambiguity in its mandate that an employee be convicted of a crime before he is subject to disciplinary proceedings by the Personnel Advisory Board.

Therefore, it is our opinion that the mere arrest and imposition of criminal charges against a state civil service employee is not, in itself, grounds for disciplinary action being taken against him.

Very truly yours,

JOHN C. DANFORTH
Attorney General

March 11, 1975

OPINION LETTER NO. 29
Answer by letter-Wood

Honorable John W. Reid, II
Prosecuting Attorney
Madison County
148 East Main Street
Fredericktown, Missouri 63645



Dear Mr. Reid:

This is in response to your request for our legal opinion on the following questions:

- "1. May the trustees of a County hospital established under 1969 R.S.Mo. 205.160 contract with Doctors for Emergency Room duties for weekends, paying said Emergency Room doctors out of the County hospital funds on an hourly rate and providing for uniforms, meals, paid vacations.
- "2. If the answer to the first question is in the affirmative, then may the contract limit the doctors practice to only Emergency Room duties and prohibit the Emergency Room doctors to admit patients to the hospital in the name of the Emergency Room doctor."

The Madison Memorial Hospital Administrator advises us that the hospital will bill patients for emergency room services, including a charge for the physician's treatment, and that the physician will not bill the patient separately for such emergency room treatment.

You state that the first question is prompted by a concern as to the constitutionality of the scheme, due to Article VI, Section

Honorable John W. Reid, II

23, Constitution of Missouri, as well as whether there is statutory authority for it.

Article VI, Section 23, places the following restriction on local governmental entities:

"No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this Constitution."

Article VI, Section 25, is to the same effect. This restriction on granting public money or property, or lending public credit to any private person or corporation, is also placed on the General Assembly by Article III, Section 38(a). It has been ruled under both constitutional provisions that appropriations of public funds for the support of the financially destitute are proper expenditures, Jasper County Farm Bureau v. Jasper County, 286 S.W. 381, 383 (Mo. 1926). Therefore, we think that a county may constitutionally expend its funds for medical treatment of indigent inhabitants of the county.

The County Hospital Law, Sections 205.160-205.340, RSMo (L.Mo. 1917, p. 145) provides for the construction, maintenance, and government of a county hospital by an elected board of trustees. The law stipulates the following powers that may be exercised by the board of trustees and their responsibilities in undertaking the operation of the county hospital:

"4. The board of hospital trustees shall make and adopt such bylaws, rules and regulations for their own guidance and for the government of the hospital as may be deemed expedient for the economic and equitable conduct thereof, . . .

"5. Said board of hospital trustees shall have power to appoint a suitable superintendent or matron, or both, and necessary assistants and fix their compensation, and shall also have power to remove such appointees; and shall in general carry out the spirit and intent of [this law] . . . in establishing and maintaining a county public hospital." (Section 205.190, RSMo)

Honorable John W. Reid, II

"Every hospital established under [this law] . . . shall be for the benefit of the inhabitants of such county and of any person falling sick or being injured or maimed within its limits, but every such inhabitant or person who is not a pauper shall pay . . . for such county public hospital, a reasonable compensation for occupancy, nursing, care, medicine, or attendants, according to the rules and regulations prescribed by said board, . . ."
(Section 205.270, RSMo)

"The board of hospital trustees shall have power to determine whether or not patients presented at said public hospital for treatment are subjects for charity, and shall fix such price for compensation for patients, other than those unable to assist themselves, as the said board deems proper, . . ."
(Section 205.330, RSMo)

In our opinion, these statutes are adequate authority for the board of trustees of a county hospital to contract with physicians for the rendering of professional medical services to persons admitted to the hospital. We believe that the board of trustees must charge and attempt to collect for such services from all persons receiving the services and who are able to pay for the services. We also believe the board of trustees can properly expend its funds for professional medical services rendered in the hospital to persons unable to pay for the services. We further believe that the board of trustees may agree to compensate physicians for these services in the form of direct monetary payments and by providing uniforms, meals, paid vacations, or other benefits either alone or in conjunction with direct payments.

In regard to your second question, consideration must be given to the following sections of the County Hospital Law:

"1. In the management of such public hospital no discrimination shall be made against practitioners of any school of medicine recognized by the laws of Missouri, and all such legal practitioners shall have equal privileges in treating patients in said hospital.

"2. The patient shall have the absolute right to employ at his or her own expense his or her own physician, and when acting for any patient in such hospital the physician employed by such patient shall have exclusive charge of the care

Honorable John W. Reid, II

and treatment of such patient, and nurses therein shall as to such patient be subject to the directions of such physician; subject always to such general rules and regulations as shall be established by the board of trustees under the provisions of [this law]. . . ." (Section 205.300, RSMo, (L.Mo. 1917, p. 149))

"1. The board of hospital trustees shall include in its bylaws that every physician, a [sic] podiatrist and dentist requesting permission to practice in its hospital shall submit an application for staff membership in writing to it upon forms approved by the board. In his application each applicant shall give specifically his training and qualifications, his willingness to accept the board as the supreme governing authority of the hospital, his willingness to abide by the bylaws of the board and the staff in all respects, and his determination to practice his profession in a manner which is legal, moral, and ethical. . . .

"2. The professional staff of the hospital shall be an organized group which shall initiate and, with the approval of the board, adopt bylaws, rules, regulations, and policies governing professional activities in the hospital. General practitioners may practice in the hospital in accordance with their competence as recommended by the professional staff and as authorized by the board." (Section 205.195, RSMo Supp. 1973, (L.Mo. 1971, p. 269))

In Attorney General's Opinions No. 51, July 19, 1961, Lauer and No. 210, June 5, 1962, Toohey, this office expressed the view that by virtue of Section 205.300, RSMo, any physician currently licensed by the State Board for the Registration of the Healing Arts under Chapter 334, RSMo, had the right to treat the physician's own patients in a public county hospital. It does not appear that the 1971 legislation, Section 205.195, RSMo Supp. 1973, withdrew this right. No facts are given in the request which allegedly justify the board of trustees in denying the doctor the right to treat patients in the hospital other than in the emergency room. Consequently, we do not believe the board of trustees

Honorable John W. Reid, II

can through a contract with an emergency room physician abridge the right of such physician to treat patients in the hospital.

Yours very truly,

JOHN C. DANFORTH
Attorney General

February 19, 1975

OPINION LETTER NO. 30
Answer by letter-Jones

Dr. Robert D. Elsea, Executive Secretary
Public School Retirement System of Missouri
Post Office Box 268
Jefferson City, Missouri 65101



Dear Dr. Elsea:

This letter is to acknowledge receipt of a request from your predecessor for an opinion from this office which provides as follows:

"Whether or not new employees of the Department of Elementary and Secondary Education, the Missouri School for the Blind, and the Missouri School for the Deaf, are entitled to participate in the Public School Retirement System as a result of the passage of Senate Bill No. 1, commonly referred to as the Reorganization Bill? We also would wish your response to cover employees and employers set forth in Section 169.130.1 and Section 169.130.3."

The following facts were also furnished in the opinion request:

"Under the provisions of subsection 16 of Section 169.010 RSMo Supp. 1973, persons employed in the State Department of Education or by the State Board of Education in an executive capacity and other persons employed by said State Board of Education on a full time basis who shall be duly certificated under the law governing the certification of teachers are entitled to membership in the Public School Retirement System. As a result various employees of the Department of Education, the Missouri School for

Dr. Robert D. Elsea

the Blind, and the Missouri School for the Deaf are members of this Retirement System.

"However, under the provisions of Section 5 (1) and (2) pages 20 and 21 of Senate Bill No. 1, there is created a Department of Elementary and Secondary Education, and the Department of Education is abolished. Also the Missouri School for the Deaf, and the Missouri School for the Blind, are transferred to the Department of Elementary and Secondary Education by a Type 1 transfer.

"We have presumed that new employees of the Department of Elementary and Secondary Education, the Missouri School for the Deaf and the Missouri School for the Blind are eligible to participate in the Retirement System, but a question has been raised, and a formal opinion is needed to clarify the matter."

It is our understanding that your question relates to whether or not new employees of the various agencies and departments that you mentioned in your opinion request will be eligible to participate in the Retirement System. In this regard, the Public School Retirement System of Missouri is provided for in Sections 169.010 through 169.130, RSMo 1969. The phrase "public school" is defined in subsection 12 of Section 169.010, RSMo Supp. 1973, as follows:

"(12) 'Public School' shall mean any school conducted within the state under the authority and supervision of a duly elected district or city or town board of directors or board of education and the board of regents of the several state teachers' colleges, or state colleges, board of trustees of the public school retirement system of Missouri, and also the state of Missouri and each county thereof, to the extent that the state and the several counties are employers of teachers as herein designated;"

The word "teacher" is defined in part in subsection 16 of Section 169.010, RSMo Supp. 1973, as follows:

"(16) 'Teacher' shall mean . . . and the state superintendent of public schools or commissioner of education, persons employed

Dr. Robert D. Elsea

in the state department of education or by the state board of education in an executive capacity and other persons employed by said state board of education on a full-time basis who shall be duly certificated under the law governing the certification of teachers; . . ."

In addition, subsections 1 and 3 of Section 169.130, RSMo 1969, provides as follows:

"1. Any person, duly certified under the law governing the certification of teachers, employed full time as a teacher by the state board of training schools, by the division of inmate education of the department of corrections, or by a division of the state department of public health and welfare and who renders services in a school whose standards of education are set and which is supervised by a public school officer of the county in which the school is located or by the state department of education, is a member of the public school retirement system of Missouri. Any such person who becomes a member before the end of the school year next following July 18, 1948, may claim and receive credit for prior service. The contributions required to be made by the member's employer shall be paid from appropriations to the institution by which the member is employed.

* * *

"3. Any person, duly certificated under the law governing the certification of teachers, employed full time, and whose duties include participation in the educational program of the division of mental diseases, in either a teaching or supervisory teaching capacity shall, after August 7, 1969, be a member of the public school retirement system, but any such person whose employment with the division of mental diseases commenced prior to August 7, 1969, may elect not to become a member by so notifying the division of mental diseases in writing within thirty days after August 7, 1969."

Dr. Robert D. Elsea

Initially, we note that Section 5.1 of C.C.S.H.C.S.S.C.S. Senate Bill No. 1, First Extraordinary Session, 77th General Assembly (hereinafter referred to as Senate Bill No. 1), provides for the creation of a Department of Elementary and Secondary Education. Section 5.4 of Senate Bill No. 1 indicates that the Missouri School for the Deaf, Chapter 178, RSMo, and others, and the Missouri School for the Blind, Chapter 178, RSMo, and others, are transferred to the Department of Elementary and Secondary Education by a Type I transfer. In Section 9.3 of Senate Bill No. 1, the Division of Mental Health of the Department of Health and Welfare, Chapter 202, RSMo, and others, is abolished and all powers, duties, and functions then assigned by law to the division, the director of the Division of Mental Health or any of the institutions or officials of the division are transferred by Type I transfer to the Department of Mental Health. Section 13.1 of Senate Bill No. 1 provides for the creation of a Department of Social Services. Said section also provides that all the powers, duties, and functions of the director of the Department of Public Health and Welfare, Chapters 191 and 192, RSMo, and others, not previously reassigned by executive reorganization plan 2 of 1973 as submitted by the Governor under Chapter 26, RSMo, and except those assigned to the Department of Mental Health are transferred by Type I transfer to the Director of the Department of Social Services. Section 13.15 of Senate Bill No. 1 provides that all the powers, duties, and functions of the Department of Corrections, Chapter 216, RSMo, and others, are transferred by Type II transfer to the Department of Social Services and the Department of Corrections is abolished. The divisions within the Department of Corrections shall be redesignated as sections. Section 13.16 of Senate Bill No. 1 provides that all the powers, duties, and functions vested in the State Board of Training Schools, Chapter 219, RSMo, and others, are transferred by Type I transfer to the Division of Youth Services which is authorized to be in the Department of Social Services. Lastly, Section 1.11 of Senate Bill No. 1 reads as follows:

"11. Nothing in this act shall be interpreted as transferring any employee from one state pension or retirement system to another."

In connection with the above, the primary rule of statutory construction is to ascertain and give effect to legislative intent. City of Kirkwood v. Allen, 399 S.W.2d 30 (Mo.Banc 1966). Also, in interpreting a statute, one must presume that the legislature intended a logical and reasonable result. McCarthy v. Board of Trustees of the Firemen's Retirement System of St. Louis, 462 S.W.2d 827 (St.L.Ct.App. 1970). Under such circumstances, it is our view that the legislature did not intend by the passage of Senate Bill No. 1, to exclude old or new teachers of the various departments and agencies that you referred to in your opinion

Dr. Robert D. Elsea

request from participating in the Public School Retirement System of Missouri.

It is, therefore, our view that the passage of Senate Bill No. 1, First Extraordinary Session, 77th General Assembly, commonly referred to as the Reorganization Bill, does not preclude new teachers of the Department of Elementary and Secondary Education, the Missouri School for the Blind, and the Missouri School for the Deaf, and the teachers set forth in subsections 1 and 3 of Section 169.130, RSMo 1969, from participating in the Public School Retirement System of Missouri.

Yours very truly,

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH
ATTORNEY GENERAL

February 10, 1975

OPINION LETTER NO. 31

Mr. George M. Camp, Director
Missouri Division of Corrections
911 Missouri Boulevard
Jefferson City, Missouri 65101

Dear Mr. Camp:

Your request for an official opinion reads as follows:

"May the Division of Corrections permit inmates to attend community functions, such as church or organizational meetings, or to participate in other activities approved by the Division, without resorting to the use of the furlough statutes, by authorizing volunteer persons who are not employees of the Division to have temporary custody and control of inmates outside of the institutions at such times?"

In this state, the control and supervision of state correctional institutions is strictly regulated by statute. The applicable section is Chapter 216 of the Revised Statutes of Missouri, 1969, entitled "State Correctional Institutions." In essence, what you are seeking is the conditional release of a prisoner, for a limited period of time, under the supervision of volunteer persons who are not employees of the Division of Corrections. There is no statutory provision authorizing such procedure. In the case of Wright v. Settle, 293 F.2d 317, 318 (8th Cir. 1961), the court stated that:

". . . Conditional releases and paroles do not have existence or incidents, except such as the statutes creating them provide. One who is given a conditional release or a parole takes it as a matter of law on the basis

Mr. George M. Camp

of the statutes. He cannot claim rights or privileges thereunder except such as can expressly or implicitly be found in the language of the statutes."

Similarly, in 72 C.J.S. Prisons §5 (1951), at page 852, it is stated that:

"The matter of the supervision of prisons is usually regulated by statutes. . . . These functions can be performed only by the officers, boards, or other authority to whom they have been intrusted by law."

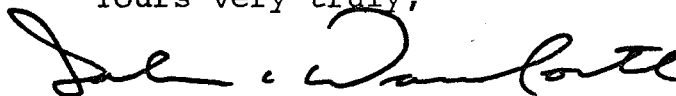
As previously stated, the regulation and control of the state correctional institutions is strictly governed by statute. Section 216.230, RSMo 1969, states that:

"1. The warden or superintendent of each institution shall, with the approval of the director of the division of administration and in conformance with the provisions of this and other laws, appoint assistants and other employees necessary to the proper conduct of the institution of which he or she is warden or superintendent." (Emphasis added)

This section requires the appointment of assistants or other employees to aid in a proper conduct of the institution. This would seem to preclude the use of nonemployees for such functions.

It is our view that the Division of Corrections does not have authority to permit inmates to attend community functions under the supervision of volunteer persons who are not employees of the Division.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

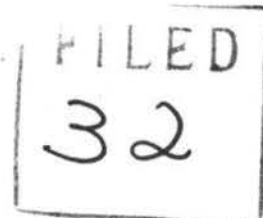
JOHN C. DANFORTH
Attorney General

SHERIFFS: Sheriffs in a third or fourth class
PARTITION: county may not be appointed to the
COMPENSATION: office of special commissioner pur-
CONFLICT OF INTEREST: suant to Section 528.540, RSMo 1969,
relating to partitions; a sheriff in
the above counties may be appointed as one of the commissioners
under Section 528.200, RSMo 1969; a sheriff appointed to the
position of commissioner under Section 528.200, RSMo 1969, may
retain the fees he receives as compensation for his service in
that position, and the wife of a sheriff may be appointed to
either the position of commissioner or special commissioner and
may retain the fees that she receives therefor.

OPINION NO. 32

January 13, 1975

Honorable John D. Ashcroft
State Auditor
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Ashcroft:

This is in response to your request for an official opinion
on the following questions:

- "1. May a sheriff in a third or fourth class county be appointed a special commissioner pursuant to section 528.540 RSMo 1969 in a private capacity apart from his capacity as sheriff to perform duties with respect to partition suits.
- "2. May a sheriff in the above mentioned counties be selected as one of the commissioners pursuant to section 528.200 RSMo 1969?
- "3. If it is permissible to appoint a sheriff to either of these positions, are his fees accountable to the county or does he act in a 'private capacity' other than as sheriff such that he may retain the fees?

Honorable John D. Ashcroft

"4. Would the appointment of the wife of the sheriff as one of the commissioners or a special commissioner, avoid the necessity of accounting for such fees?"

Sections 528.370, 528.380, 528.400, 528.410, 528.430, 528.440, 528.450, 528.460, 528.470, 528.590, and 528.600, RSMo 1969, set out the duties and responsibilities of a sheriff with regard to a partition sale.

Section 528.540, RSMo, provides as follows:

"A majority of the commissioners, in all cases, shall have power to act; and all sales made under the foregoing provisions shall be made by the sheriff of the county in which such lands, tenements or hereditaments, or any portion of them, may be situate, or by a special commissioner appointed by the court for that purpose."

Section 528.580, RSMo 1969, provides that:

"Every special commissioner appointed under the provisions of this chapter shall perform the same duties, and with like effect, as are enjoined by this chapter upon sheriffs; and in the performance of said duties he shall be governed by the same rules applicable to sheriffs in like cases, and he shall receive such compensation for his services as may in each case be fixed by the court."

We feel that this section, speaking in terms of duties "enjoined" upon sheriffs, indicates that these duties are placed primarily upon the sheriff. As a corollary, we feel that ordinarily a special commissioner is appointed only when a sheriff is, for some reason, unable to perform these duties: The sheriff may have some interest in the case, he may be too pressed with other duties, or the sale may be of such complexity that a sheriff would not be able to devote the necessary attention to it. An example of the latter appears in Haley v. Horwitz, 290 S.W.2d 414 (St.L.Ct.App. 1956), in which the court dealt with the reasonableness of the fee granted to a special commissioner.

". . . The additional work done was no more than should be reasonably expected

Honorable John D. Ashcroft

from one who expects to be paid a fee in excess of that allowed to the sheriff for making a sale. Otherwise, there would be no point in seeking the service of a special commissioner. . . ." Id. at 420.

In addition, the compensation of a sheriff is fixed by Section 528.610, RSMo 1969, and this fee is required by Sections 57.407.3 and 57.409.3, RSMo 1969, to be deposited into the county treasury in third and fourth class counties. See Opinion No. 108, Holman, 1-9-70. If a sheriff were allowed to be appointed as a special commissioner, this might allow him not only to retain the fees but to receive a fee in excess of the limit fixed by Section 528.610.

We feel, therefore, that the legislative scheme set out in Chapter 528 intends that a special commissioner is to be appointed in lieu of the sheriff and that, as a result, a sheriff may not be appointed to this position. If a sheriff is able to and does conduct a partition sale, he does so in his official capacity and the provisions as to the limit and disposition of fees for performance of this duty apply.

Your second question inquires whether it is permissible to appoint a sheriff to the commission created under Section 528.200, RSMo 1969. This section reads as follows:

"Whenever any judgment of partition shall be rendered, the court shall appoint not less than three nor more than five competent persons as commissioners, residents of the county, or any of the counties in which the premises to be divided shall be situated, to admeasure and set off the dower, if any, and to make the partition so adjudged, according to the respective rights and interests of the parties, as the same were ascertained and determined by the court, and shall designate the part or share, if any, which shall remain undivided."

It is a settled principle of law that unless the Constitution, a statute, or the common law prohibits the holding of two public offices by one individual, an individual may hold two offices simultaneously. United States v. Saunders, 120 U.S. 126 (1887); State ex rel. Zevely v. Hackmann, 254 S.W. 53 (Mo. Banc 1923); State ex rel. Koehler v. Bulger, 233 S.W. 486 (Mo. Banc 1921); State ex rel. Walker v. Bus, 36 S.W. 636 (Mo. Banc 1896);

Honorable John D. Ashcroft

and Bruce v. City of St. Louis, 217 S.W.2d 744 (St.L.Ct.App. 1949). Since there are no constitutional or statutory prohibitions in Missouri against the same person serving as sheriff and as a commissioner under Section 528.200, RSMo 1969, the principal issue posed is whether the two positions are incompatible under the common law.

The common law rule is stated in the case of State ex rel. Walker v. Bus, supra, as follows:

" . . . At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two,--some conflict in the duties required of the officers, as where one has some supervision of the others, is required to deal with, control, or assist him. It was said by Judge Folger (People v. Green, 58 N. Y. 295): 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that "incompatibility" from which the law declares that the acceptance of the one is the vacation of the other. The force of the word in its application to this matter is that, from the nature and relations to each other of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one towards the incumbent of the other. . . . The offices must subordinate, one the other, and they must per se have the right to interfere, one with the other, before they are incompatible at common law.' . . ." Id. at 639-640.

It is our opinion that the positions of sheriff and commissioner are not incompatible in light of this test. The commission, although it is its duty to determine if division of the land is impractical, does not exercise any supervisory power over the sheriff in making the sale which is the result of that determination. The circuit court must first approve the report of the commission,

Honorable John D. Ashcroft

and it is the court then who orders the sheriff to make the sale. Section 528.340, RSMo 1969. The sheriff upon making the sale reports to the court. Section 528.540, RSMo 1969. Thus, it is the court rather than the commission which supervises the sale. We conclude that these offices are not incompatible and that a sheriff may be appointed to a commission under Section 528.200, RSMo 1969.

Your third question relates to the disposition of fees paid to the sheriff if it is determined that a sheriff may hold the positions of commissioner or special commissioner. Since we have concluded that a sheriff may hold only the position of commissioner, we need determine only the disposition of those fees. This involves an interpretation of Sections 57.407.3 and 57.409.3, RSMo 1969.

Paragraph 3 of Section 57.407 states:

"In counties of the third class after October 13, 1969, the sheriff shall pay all fees collected by him in civil matters, and which were previously retainable by him, into the county treasury, except charges for each mile traveled, allowable to him, which he may retain, in serving civil process."

Paragraph 3 of Section 57.409 states:

"In counties of the fourth class after October 13, 1969, the sheriff shall pay all fees collected by him in civil matters, and which were previously retainable by him, into the county treasury, except charges for each mile traveled, allowable to him, which he may retain, in serving civil process."

It should be noted that the duties of conducting a partition sale are imposed upon the sheriff by statute. There is no comparable provision which imposes upon him duties of a commissioner. The Missouri Supreme Court in determining whether a deputy constable was acting in an official capacity adopted the following test. "''. . . Would he have acted in the particular instance, if he were not clothed with his official character, or would he have so acted if he were not an officer? . . .'" State ex rel. Kaercher v. Roth, 49 S.W.2d 109, 110-111 (Mo. 1932). In the present context, whether an individual serves on the commission is in no way related to the holding of the office of sheriff. We feel, then, that in serving on the commission, a sheriff is not

Honorable John D. Ashcroft

acting in his official capacity. Further, it is our opinion that the above sections relating to disposition of a sheriff's fees refer only to fees accruing to the office of sheriff as compensation for performance of duties imposed upon the sheriff. If a sheriff is not acting in an official capacity, the fees could be retained by him and not deposited in the county treasury. See Opinion No. 304, Holman, 5-7-70. Therefore, the sheriff may retain the fees collected by him as compensation for his service as a commissioner.

With regard to your final question, it is our opinion that so long as the wife of the sheriff is competent to be appointed to the positions of commissioner or special commissioner, her marriage to the sheriff would not prevent her from being so appointed. Furthermore, fees received by her relating to the performance of her duties in these positions should be treated as in the case of any other private individual and should not be deposited in the county treasury.

CONCLUSION

It is our opinion that sheriffs in a third or fourth class county may not be appointed to the office of special commissioner pursuant to Section 528.540, RSMo 1969, relating to partitions; that a sheriff in the above counties may be appointed as one of the commissioners under Section 528.200, RSMo 1969; that a sheriff appointed to the position of commissioner under Section 528.200, RSMo 1969, may retain the fees he receives as compensation for his service in that position, and that the wife of a sheriff may be appointed to either the position of commissioner or special commissioner and may retain the fees that she receives therefor.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert Presson.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 108
1-9-70, Holman

Op. No. 304
5-7-70, Holman

SCHOOLS:

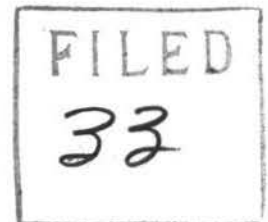
In computing "the average cost of transporting all children of the district" and in computing

"the additional cost of transporting handicapped and severely handicapped children" for the purposes of Section 162.985, RSMo 1973 Supp., all expenditures reasonably related to the school district's transportation program should be included in the computation. The amount of additional state transportation aid authorized by Section 162.985, RSMo 1973 Supp., with respect to handicapped and severely handicapped children should be determined by the following formula: a district's average cost of transporting a handicapped or severely handicapped child minus average per pupil cost of transporting all children in the district (handicapped, severely handicapped and non-handicapped) times the number of handicapped and severely handicapped children transported divided by two.

OPINION NO. 33

March 4, 1975

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Elementary and
Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This is in response to your request for an official opinion on the following questions:

"Section 162.985, RSMo 1973 Supp. provides that districts transporting handicapped and severely handicapped children in accordance with applicable law, rules and regulations shall receive transportation aid in accordance with the schedule of payments set forth in Section 163.161, RSMo, and an additional amount 'equal to half the additional cost of transporting handicapped and severely handicapped children above the average per pupil

Dr. Arthur L. Mallory

cost of transporting all children of the district.' What expenditures can legally be included in computing 'average per pupil cost'? What expenditures may be included in computing 'additional cost for transporting handicapped and severely handicapped children'?

"Districts organized for 'vocational education and for the education and training of handicapped and severely handicapped children' will need a higher percentage of specially fitted and equipped vehicles for transporting pupils than will those districts serving all resident pupils. What expenditures can be included in computing average per pupil cost? What expenditures can be included in computing additional cost?"

Section 162.985 provides as follows:

"Transportation aid for handicapped and severely handicapped students attending classes within the school district, special district or nearby district under a contractual arrangement shall be paid in accordance with the schedule set forth in section 163.161, RSMo. In addition, an amount equal to half of the additional cost of transporting handicapped and severely handicapped children above the average per pupil cost of transporting all children of the district shall be apportioned where such special transportation is approved in advance by the state department of education and is in accordance with laws and regulations governing school transportation vehicles. If children are transported to regular public school programs and also to a special school for an appropriate special program, the district furnishing the transportation may qualify for transportation reimbursement for both programs if approved by the state department of education."

Dr. Arthur L. Mallory

Question No. 1

What expenditures can properly be included in computing "average per pupil cost?"

As used in Section 162.985, "average per pupil cost" relates to the average cost of "transporting all children of the district. . . ." You have not requested advice on the propriety of including a particular expenditure in the computation of this average. We decline to attempt to list all expenditures which should be included.

The General Assembly has given to the State Department of Elementary and Secondary Education and the State Board of Education the general responsibility for distributing state financial aid to school districts, including transportation aid. See Sections 162.985, 163.031, et seq., and 163.161. Therefore, the State Department of Elementary and Secondary Education or the State Board of Education should determine which expenditures are reasonably related to a district's transportation program and require that these expenditures be used in computing this average.

For years Section 163.161 has required that state reimbursement for transportation expenses cannot exceed the "actual cost per pupil" of a district's transportation program. Therefore, some guidance in determining expenditures to be included in the average per pupil cost of transporting all children of the district can be obtained from the practice of the State Board of Education and the State Department of Elementary and Secondary Education in enforcing the provisions of Section 163.161.

Question No. 2

What expenditures can be included in computing "the additional cost of transporting handicapped and severely handicapped children?"

As with the expenditures to be included in determining the average cost of transporting all pupils, you have not presented this office with any particular expenditure about which there is a question. We decline to attempt to list all appropriate expenditures. However, we believe that all expenditures reasonably related to the transportation of handicapped and severely

Dr. Arthur L. Mallory

handicapped pupils should be included in computing the additional transportation costs.

Question No. 3

With reference to special school districts organized pursuant to Section 162.825, et seq., what expenditures can be included in computing "average per pupil cost?"

The type of expenditures which can be included for special districts in computing "average per pupil cost" would be the same as for regular school districts. See answer to question No. 1.

Because special school districts transport vocational students as well as handicapped and severely handicapped students, a special school district's "average per pupil cost of transporting all children" should be somewhat less than the district's average per pupil cost of transporting handicapped and severely handicapped children. Therefore, a special district should have some "additional cost of transporting handicapped and severely handicapped children . . ." so as to qualify for special transportation aid under Section 162.985. Undoubtedly there would be less special transportation aid on a per capita basis for a special district than for a regular district because the "average per pupil cost of transporting all children" would probably be lower in most regular districts than in most special districts. This result seems somewhat anomalous in view of the fact that such districts carry the entire burden of educating handicapped and severely handicapped children in their areas. However, it is not our function to redraft legislative enactments.

Question No. 4

What expenditures can be included for special districts in computing "the additional cost of transporting handicapped and severely handicapped children?"

I believe this question is fully answered by the answer to question No. 2 herein.

Dr. Arthur L. Mallory

Question No. 5

How should the statutory formula in Section 162.985, RSMo 1973 Supp., be interpreted?

As a result of subsequent communication we understand you also request guidance in interpreting the statutory formula appearing in Section 162.985, RSMo 1973 Supp.

The statutory formula first calls for computation of average per pupil cost of transporting all children in the district since only costs in excess of this figure are eligible for state aid. Taking the term "all" in its ordinary meaning, we believe that the average per pupil transportation cost is to be computed by dividing all transportation costs (including those pertaining to handicapped and severely handicapped children) by the total number of pupils transported (including handicapped and severely handicapped children). Note that the statute does not refer to the average cost of transporting "all other" children. In the absence of a term such as "other" average cost must be determined on the basis of both handicapped, severely handicapped, and non-handicapped children.

The statute then provides that school districts shall receive aid in the amount of one-half of the additional cost above this average figure. The statute speaks of this additional cost in terms of a gross amount, but then provides that it must be in excess of an average amount. Thus, although the statute does not specifically provide for the computation of another average figure, we believe that this must be done in order to arrive at a logical cost figure. In the context of the statute, we believe the second average figure must be the average cost of transporting handicapped and severely handicapped children.

Thus, the additional cost of transporting handicapped and severely handicapped children is the average per pupil cost of transporting such children minus the average per pupil cost of transporting all children times the number of handicapped and severely handicapped children transported. One-half of this difference is the amount of state aid.

Dr. Arthur L. Mallory

As to how this formula applies to special school districts organized for "vocational education and for the education and training of handicapped and severely handicapped children" we believe that the above computations should be made on the same basis as regular school districts.

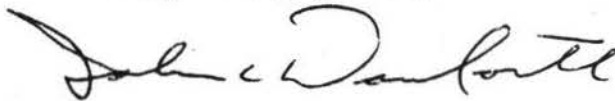
CONCLUSION

It is the opinion of this office that in computing "the average cost of transporting all children of the district" and in computing "the additional cost of transporting handicapped and severely handicapped children" for the purposes of Section 162.985, RSMo 1973 Supp., all expenditures reasonably related to the school district's transportation program should be included in the computation.

It is the further opinion of this office that the amount of additional state transportation aid authorized by Section 162.985, RSMo 1973 Supp., with respect to handicapped and severely handicapped children should be determined by the following formula: a district's average cost of transporting a handicapped or severely handicapped child minus average per pupil cost of transporting all children in the district (handicapped, severely handicapped and non-handicapped) times the number of handicapped and severely handicapped children transported divided by two.

This opinion, which I hereby approve, was prepared by my assistant, Robert Presson.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

GOVERNOR:
MERIT SYSTEM:
REORGANIZATION ACT:
DIVISION OF ADMINISTRATION:
COMMISSIONER OF ADMINISTRATION:

Division heads who are provided for in departmental plans pursuant to Section 1.6(2) of S.B. No. 1, First Extraordinary Session, 77th General Assembly, are division heads who are to be ap-

pointed by the department director under Section 1.6(6) of S.B. No. 1, and therefore such appointments come under the exemption of subsection 1(1) of Section 36.030, H.B. No. 8, First Extraordinary Session, 77th General Assembly, and are not covered by provisions of the merit system law, subject, of course, to Article IV, Section 19, Constitution of Missouri.

OPINION NO. 37

February 5, 1975

Mr. Mark Edelman
Deputy Commissioner of Administration
Room 123, State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Edelman:

This opinion is in response to your question asking whether the exemption from the merit system provisions relating to heads of divisions of service includes heads of divisions of service established by department directors, or only applies to heads of divisions of service that are explicitly provided for by statute.

Subsection 1(1) of Section 36.030 (H.C.S.H.B. No. 8, First Extraordinary Session, 77th General Assembly), which contains exemptions from the state merit system, provides in part as follows:

" . . . the following offices and positions
 . . . are not subject to this law [merit
 system] and may be filled without regard to
 its provisions:

(1) Other provisions of the law to the contrary notwithstanding, members of boards and commissions and heads of divisions of service having specified terms of office or required by law to be appointed by the governor or by the director of a department of the executive branch of government, except the personnel director;" (Emphasis added)

Mr. Mark Edelman

Your question is simply the meaning of the provision in Section 36.030 excepting "... heads of divisions of service ... required by law to be appointed ... by the director of a department ...". It is obvious, of course, that if there is a statute which creates a division within a department and directs that the division head be appointed by the director of the department, such appointment is exempt from the operation of the merit system law. Your question is whether this also applies to directors of divisions which are created by heads of departments as authorized by Section 1.6(2) of the "Omnibus State Reorganization Act of 1974," C.C.S.H.C.S.S.C.S.S.B. No. 1, First Extraordinary Session, 77th General Assembly, known hereafter as S.B. No. 1. In such provision, the head of each department is authorized to establish the internal organization of the department and in doing so shall develop a departmental plan to be approved by the Governor in accordance with the transfer by type provided in S.B. No. 1. This plan as approved is then filed with the Secretary of State and with the Commissioner of Administration and the Revisor of Statutes. Authority is given for the organization of the department into divisions, and therefore for the creation of divisions within the department.

In such situations, Section 1.6(6) of S.B. No. 1 provides in part:

"... Subject to the provisions of chapter 36, RSMo, where they apply, the department director shall appoint all division heads unless otherwise provided in this act and such division heads and the deputy director of the department shall serve at the pleasure of the director of the department or unless otherwise provided by this act."

It is our opinion that all division heads provided either by statute or in the departmental plan are then to be appointed by the director of the department, unless specific provisions in S.B. No. 1 provide for a different manner of appointment for any specific division head. Accordingly, it is our view that such division directors are those directors "... required by law to be appointed ... by the director of a department ..." under subsection 1(1) of Section 36.030. In other words, the only requirement of this provision is that if there is a position of division head, and if it is required by law that such appointment be made by the Governor or the director of the department, such position is then exempt from the merit system. Finally, we note that

Mr. Mark Edelman

such general exemption provisions are, of course, subject to the provisions of Article IV, Section 19, Constitution of Missouri.

CONCLUSION

It is the opinion of this office that division heads who are provided for in departmental plans pursuant to Section 1.6(2) of S.B. No. 1, First Extraordinary Session, 77th General Assembly, are division heads who are to be appointed by the department director under Section 1.6(6) of S.B. No. 1, and therefore such appointments come under the exemption of subsection 1(1) of Section 36.030, H.B. No. 8, First Extraordinary Session, 77th General Assembly, and are not covered by provisions of the merit system law, subject, of course, to Article IV, Section 19, Constitution of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH
ATTORNEY GENERAL

March 20, 1975

OPINION LETTER NO. 39

Honorable Christopher S. Bond
Governor of Missouri
Executive Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Governor Bond:

This letter is in response to your question asking:

"Article VIII of the Charter of the City of St. Louis establishes a civil service system. Can the State place the employees of the Collector's Office of the City of St. Louis, a 'county office', under that civil service system by statutory provisions."

The principal objection to such legislation would be the prohibition of Article VI, Section 22, Missouri Constitution. It appears, however, that the Supreme Court of Missouri in its opinion of February 21, 1975, concerning the establishment of a City of St. Louis medical examiner, State ex rel. McClellan v. Godfrey, No. 58894 (Mo.Banc February 21, 1975), has ruled on the point. The pertinent portion of that opinion follows:

"A separate issue is whether § 58.760 (4) is unconstitutional as imposing an unlawful responsibility on the mayor of the city of St. Louis. Art. 6, § 22, of this state's constitution declares that:

No law shall be enacted creating or fixing the powers, duties or compensation of any municipal office or employment, for any city framing or adopting its own charter under this or any previous constitution ...

Honorable Christopher S. Bond

"The constitutional vice urged by respondent is that the statute in question here imposes on, or allows, the mayor the right not only to call the election but to appoint a medical examiner and to fix the latter's compensation. This is allegedly an unconstitutional interference with the exercise of the duties of a municipal office in a charter city.

"The key to the applicability of Art. 6, § 22, is the distinction between municipal offices and county offices. The constitutional provision covers only 'municipal office ... for any city.' The same question was resolved in *Stemmler v. Einstein*, *supra*, and *Preisler v. Hayden*, *supra*. Therein, it was decided that the status of a county office or officer was not subject to the restrictions found in § 22 of Art. 6. Relators are correct in urging that: '[t]here can be no question that the office of Medical Examiner ... is a county office; it replaces the county office of coroner.' The activity of the mayor, called for by the Act, creates no constitutional violation because such activity does not involve the city of St. Louis in its capacity as a city but as a county. In that capacity the mayor is subject to the general laws of the state. *State ex rel. Burke v. Cervantes*, 423 S.W. 2d 791 (Mo. 1968), relied on heavily by respondent, is clearly distinguishable in that it dealt with city policemen and firemen in connection with city affairs. The point is ruled against respondent."

Although we do not have the precise content of the legislation to which you refer, it is our view that the above holding appears to remove the objection of Article VI, Section 22; and, consequently, it is probable that the court would sustain such legislation under such holding.

Yours very truly,



JOHN C. DANFORTH
Attorney General

HOSPITALS:
PHYSICIANS:
FEDERAL GRANTS:
PUBLIC RECORDS:
DIVISION OF HEALTH:

The State Board of Health is authorized by law to adopt and enforce regulations requiring hospitals licensed by the state to submit reports containing certain data relating to hospital discharges.

OPINION NO. 40

April 23, 1975

Mr. Lawrence Graham, Director
Department of Social Services
Broadway State Office Building
Jefferson City, Missouri 65101

Dear Mr. Graham:

This is in response to your request for our legal opinion on the following question:

"I request your legal opinion as to whether the Board of Health has the authority to require all hospitals in the state to report certain patient discharge data to the Division of Health for use by the division in preparing the official state plan for the construction and modernization of hospitals and other medical facilities, Section 192.230-192.250 RSMO?"

We are advised that on October 24, 1974, the State Board of Health, acting pursuant to §§ 191.420 and 197.080, RSMo, amended the hospital licensing regulations by adding the requirement that all licensed hospitals submit monthly reports to the Division of Health providing information prescribed by the Division of Health on patients discharged from the hospital. Section III, Regulation Number 3, Missouri Hospital Licensing Regulations (1974). We understand that the Division of Health has subsequently prescribed the following information for inclusion in the required monthly report of patient discharges:

- (1) patient's hospital code number
- (2) patient's year of birth
- (3) patient's sex

Mr. Lawrence Graham

- (4) patient's race
- (5) patient's residence by state, county, and zip code, census tract, or rural route
- (6) hospital code number
- (7) admission date and hour
- (8) discharge date
- (9) attending physician by hospital code number
- (10) operating physician by hospital code number
- (11) diagnosis according to international classification of diseases
- (12) disposition of patient (home, nursing home, funeral home, etc.)
- (13) expected source of payment for patient's care and treatment
- (14) service in hospital from which patient discharged
- (15) medical procedures performed on patient during hospitalization and dates performed

The Hospital Licensing Law, §§ 197.010-197.120, RSMo (L.Mo. 1953, p. 631), states its purpose is:

" . . . to provide for the development, establishment and enforcement of standards for the care and treatment of individuals in hospitals and for the construction, maintenance and operation of hospitals, which, in the light of advancing knowledge, will promote safe and adequate treatment of such individuals in hospitals." § 197.030, RSMo.

To implement the law, the Division of Health (now State Board of Health; § 191.420, RSMo (L.Mo. 1967, p. 284)), is empowered to:

" . . . adopt, amend, promulgate and enforce such rules, regulations and standards with respect to all hospitals or different types

Mr. Lawrence Graham

of hospitals to be licensed hereunder as may be designed to further the accomplishment of the purposes of this law in promoting safe and adequate treatment of individuals in hospitals in the interest of public health, safety and welfare." § 197.080, RSMo.

Statutes conferring powers upon boards of health to enable them to safeguard the public health are given a liberal construction. State ex rel. Horton v. Clark, 9 S.W.2d 635, 638 (Mo.Banc 1928); Gaddy v. State Board of Registration for the Healing Arts, 397 S.W.2d 347, 353 (Spr.Ct.App. 1965).

We believe that there is a reasonable relationship between requiring all hospitals in the state to report information as to the care and treatment of their patients and the fulfillment by the Board of Health of its duty to secure safe and adequate hospital treatment for all citizens. Accordingly, we believe that the regulation requiring the patient discharge information from all licensed hospitals is authorized by the Hospital Licensing Law, Chapter 197, RSMo, and is a valid implementation of that law.

It appears that the confidentiality of the physician-patient relationship, as codified in § 491.060(5), RSMo, will not be disturbed by the State Board of Health's instant regulation because neither the names nor addresses of patients and physicians will be revealed to the Board or the Division of Health. See State ex rel. Benoit v. Randall, 431 S.W.2d 107 (Mo.Banc 1968). Thus, it is unnecessary at this time to express our opinion on whether or not the privilege of the physician-patient relationship would prevent disclosure to the State Board of Health of otherwise confidential hospital discharge data which is to be used by the Board in carrying out its statutory duties of planning adequate health care facilities and services and engaging in programs that deal with the incidence, distribution, and control of diseases. See Klinge v. Lutheran Medical Center of St. Louis, 518 S.W.2d 157 (Mo.Ct.App. at St.L. 1974).

The Open Records and Meetings Law enacted in 1973 (The Sunshine Law) states that ". . . except as otherwise provided by law, all . . . public records shall be open to the public for inspection and duplication." (emphasis added) § 610.015, RSMo Supp. 1973. § 491.060(5), RSMo, protects the privacy of the physician-patient relationship and so would prevent the Board or Division of Health from releasing or disclosing information that would identify the parties to any particular physician-patient relationship.

A law enacted in 1945 delegated the following powers and responsibilities to the Division (Board) of Health:

Mr. Lawrence Graham

"The division of health . . . shall be empowered and authorized to conduct a complete survey of all of the hospitals, both public and private, and all health centers and units in the state, and to make a public report of such survey and findings, and recommending a state plan for the construction of such additional hospital and health center facilities as may be deemed advisable by the division of health after consultation with the state [hospital] advisory council, . . ."
§ 192.230, RSMo (L.Mo. 1945, p. 972).

"The director of the division of health will approve such applications for federal assistance in the construction and modernization of hospitals and other medical facilities as may be considered advisable after consultation with the [hospital] advisory council."
§ 192.240, sub. 6, RSMo (L.Mo. 1945, p. 972).

"The division of health . . . is hereby designated the official state agency to receive any and all federal and other grants and aids for making a survey and for the construction of hospitals and health centers, . . ."
§ 192.250, RSMo (L.Mo. 1945, p. 972).

The emergency clause accompanying the above law indicates that it was enacted in response to the 1944 Federal legislation that made available government grant funds for construction and modernization of public and nonprofit hospitals and other medical facilities. 42 U.S.C.A. § 291 (Hill-Burton). Among the conditions which must be met under such Federal law to receive these funds is that ". . . the State agency shall determine the priority of projects based on the relative need of different areas lacking adequate [hospital and other medical] facilities. . . ." 42 U.S.C.A. § 291c. We believe the requirement for hospital patient discharge information bears a reasonable relationship to the Board of Health's statutory responsibility to survey existing hospitals and determine the need for new hospitals throughout the state.

Another duty and responsibility placed upon the Division (now Board) of Health relates to the use and disposition of Federal health funds granted to the state:

"The division of health . . . is hereby designated the official agency of the

Mr. Lawrence Graham

state of Missouri to receive federal funds for health purposes. The division shall comply with the acts of congress and with any rules and conditions made by any federal agency in regard to the use and distribution of such funds. . . ." § 192.025, RSMo (L.Mo. 1951, p. 761).

This statute is consistent with the following provision in our Constitution:

" . . . Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States." Article III, § 38(a), Constitution of Missouri.

We understand that the Division of Health has contracted with the United States Department of Health, Education and Welfare to receive funds from the United States for the purposes of developing and operating a hospital discharge data program which will meet the data needs of governmental and nongovernmental data users. This contract is based upon the Health Services Research and Evaluation and Health Statistics Act of 1974, 42 U.S.C.A. § 242k which provides in part:

" . . . the Secretary, acting through the [National] Center [for Health Statistics], may--

(1) collect statistics on--

(A) the extent and nature of illness and disability of the population of the United States (or of any groupings of the people included in the population), including life expectancy, the incidence of various acute and chronic illnesses, and infant and maternal morbidity and mortality,

* * *

(E) health resources, including physicians, dentists, nurses, and other health professionals by specialty and type of practice and the supply of services by hospitals, . . .

Mr. Lawrence Graham

(F) utilization of health care,
including utilization of . . . (ii)
services of hospitals, . . .

(G) health care costs and financ-
ing, including the trends in health
care prices and cost, the sources of
payments for health care services, and
Federal, State, and local governmental
expenditures for health care services,
. . .

* * *

(e) The Secretary shall (1) assist State and
local health agencies, . . . in the design
and implementation of a cooperative system
for producing comparable and uniform health
information and statistics at the Federal,
State, and local levels; . . . (3) undertake
and support (by grant or contract) research,
development, demonstrations, and evaluations
respecting such cooperative system; (4) pro-
vide the Federal share of the data collection
costs under such system; . . .

(f) . . . the Secretary shall cooperate and
consult . . . with State and local health de-
partments and agencies. . . . he shall util-
ize insofar as possible the services or facil-
ities . . . of any appropriate State or other
public agency, . . . Payment, if any, for
such services or facilities shall be made
in such amounts as may be provided in such
agreement.

(g) To secure uniformity in the registra-
tion and collection of mortality, morbidity,
and other health data, the Secretary shall
prepare and distribute suitable and neces-
sary forms for the collection and compila-
tion of such data . . . " 42 U.S.C.A. § 242k.

Use of the data obtained thereunder by the Division of Health would
be subject to the following restriction contained in the Federal
law:

". . . information obtained in the course
of activities undertaken or supported . . .

Mr. Lawrence Graham

[by this law] may not be published or released in other form if the particular establishment or person supplying the information or described in it is identifiable unless such establishment or person has consented (as determined under regulation of the Secretary) to its publication or release in other form, . . . " 42 U.S.C.A. § 242m (d).

Finally, the Board of Health has been charged with the following duties and responsibilities:

". . . It shall designate those diseases which are infectious, contagious, communicable or dangerous in their nature and shall make and enforce adequate orders, findings, rules and regulations to prevent the spread of such diseases within the state. It shall have power . . . to make such orders, findings, rules and regulations as will prevent the entrance of infectious, contagious and communicable diseases into the state." § 192.020, RSMo (L.Mo. 1919, p. 372).

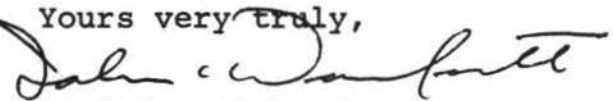
"The [board of health] . . . shall compile and issue reports and summaries of accomplishments and projects within the division [of health] as may be of benefit and advantage to the public, including information concerning vital and mortuary statistics, respecting diseases, and instructing in the subject of hygiene." § 192.040, RSMo (L.Mo. 1882, p. 95).

We believe the information yielded by the hospital patient discharge reports can substantially contribute to the Board of Health's efforts to control and prevent dangerous and contagious diseases and to issue statistical reports thereon.

CONCLUSION

It is the opinion of this office that the State Board of Health is authorized by law to adopt and enforce regulations requiring hospitals licensed by the state to submit reports containing certain data relating to hospital discharges.

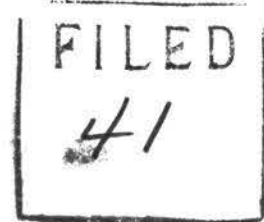
Yours very truly,


JOHN C. DANFORTH
Attorney General

April 30, 1975

OPINION LETTER NO. 41
Answer by letter-Nowotny

Mr. Edward A. Godar, Director
Division of Personnel
117 East Dunklin
Jefferson City, Missouri 65101



Dear Mr. Godar:

This opinion is in response to your question asking:

"Under what circumstances, if any, may food, living quarters, and/or other maintenance benefits be furnished to a state employee free of charge and in addition to the normal salary for such class of employee?

"(a) Is there any constitutional or statutory provision which governs this question for merit system and non-merit state employees alike?

"(b) Rules 6.4(d) and 6.4(e) of the Personnel Advisory Board limit total remuneration to actual salary and require a schedule of charges for subsistence or maintenance. Do these rules properly implement Section 36.140 RSMo? If so, may the Board under these rules provide differential treatment for some classes of employees by exempting institution superintendents from payment of rent and by granting a supplement to normal salary for medical superintendents for whom a free state-owned residence is not furnished?

"(c) Does Section 191.160 RSMo still apply to any agencies of State government as re-organized July 1, 1974? If so, to what specific agencies?

Mr. Edward A. Godar

"(d) Does Section 191.160 RSMo conflict with Section 36.140 RSMo and Rules 6.4(d) and 6.4(e) of the Personnel Advisory Board? If so, which prevails for agencies with merit employees?

(e) If Section 191.160 RSMo still allows the provisions of free room and/or board to some employees, may the Personnel Advisory Board take this into account under Section 36.140 RSMo and provide in the Merit System pay plan a differential in pay range for employees in the same class who receive and who do not receive such benefits?"

In our Opinion No. 62, 1970 to Ulett, we held that the ". . . terminology employed by the legislature [in Section 36.140, RSMo, with respect to the merit system pay plan] leads us to the conclusion that the only compensation permitted merit system employees is that which is set by and within the rates of the particular classifications of the merit system and is limited strictly to monetary compensation. . . ." and that therefore the purchase of liability insurance for the employees' benefit is not authorized. We have reviewed this conclusion and have reached the conclusion that the distinction drawn in that instance and between our Opinion No. 93, 1969 to Cason, was in error. In such opinion to Cason, copy enclosed, this office held that a school board has the authority to purchase liability insurance covering an employee's negligence even though the board enjoyed sovereign immunity and that such purchase of insurance was viewed as additional compensation to the school board employees.

It is our view that the Cason opinion is applicable in this instance and that the appointing authority under the merit system may furnish living quarters, food, and the like to employees as part of their compensation.

Personnel Advisory Board Rules 6.4(d) and (e) provide respectively:

"(d) Total Remuneration. Any salary rate established for an employee shall represent the total remuneration for the employee, not including reimbursement for official travel and subsistence while away from his official station.

"(d) Subsistence Allowances. Subsistence or maintenance allowances received in

Mr. Edward A. Godar

lieu of cash shall be considered as part of the total salary. Whenever subsistence is allowed in lieu of cash, a schedule of such charges together with a statement of the policy and rule to be followed in making the charges shall be submitted by the appointing authority to the Director, for the approval of the Board."

It follows that Rule 6.4(d) of the Personnel Advisory Board, which limits "total remuneration" to the salary rate established, standing by itself would not be consistent with the conclusion we have reached except for the fact that Rule 6.4(e) provides that subsistence or maintenance allowances received in lieu of cash shall be considered as part of the total salary.

As we view the Rules taken together, Rule 6.4(e) qualifies the definition of salary in Rule 6.4(d) and therefore both rules are consistent with our views respecting compensation.

Section 36.140, RSMo Supp. 1973, provides in pertinent part:

"1. After consultation with appointing authorities and the state fiscal officers, and after a public hearing, the director shall prepare and recommend to the board a pay plan for all classes subject to this law. The pay plan shall include, for each class of positions, a minimum and a maximum rate, and such intermediate rates as the director considers necessary or equitable. In establishing the rates, the director shall give consideration to the experience in recruiting for positions in the state service, the rates of pay prevailing in the state for the services performed, and for comparable services in public and private employment, living costs, maintenance, or other benefits received by employees, and the financial condition and policies of the state. . . ."
(Emphasis added)

In our view, the above-underscored provision recognizes that maintenance or other benefits will be received by some employees and that such must be taken into consideration in establishing the pay plan for the classification when the benefits are furnished the employee as part of his compensation. Thus, such benefits are

Mr. Edward A. Godar

to be taken into consideration by the Personnel Advisory Board in establishing a pay range for employees in the same class who receive and who do not receive such benefits.

The situation is somewhat different, however, with respect to board and living quarters furnished employees when such is furnished as a condition of employment and for the good of the state. Clearly, there are and will be situations where it is necessary for the good of the state and, therefore, essentially a condition of employment that the employees be furnished board and living quarters for the proper performance of his duties. This situation could exist in any department of the state, regardless of whether such department is under the merit system. It is our opinion that under such condition as being for the benefit of the state, that board and living quarters can be so furnished to employees of any department.

In this respect, Section 191.160, RSMo, to which you refer, merely recognizes this principle, reading as follows:

"The department of public health and welfare may provide any employee in any institution under its control with board and living quarters in addition to salary, or wages, when the director shall determine that it is for the best interest of the state to do so."

First, we note that the Department of Public Health and Welfare has been abolished and all the powers, duties, and functions of the Director of the Department of Public Health and Welfare, and particularly the powers in Chapter 191, RSMo, are now in the Department of Social Services except those assigned to the Department of Mental Health. See Section 13.1, C.C.S.H.C.S.S.C.S.S.B. No. 1, First Extraordinary Session, 77th General Assembly. Thus, the provisions of Section 191.160, as it relates to the Division of Mental Health, are now administered by the Director of the Department of Mental Health. See Section 9.3 of Senate Bill No. 1. Therefore, whatever power the Director of the Department of Public Health and Welfare had concerning Section 191.160 that authority and power is now in the Director of the Department of Social Services for that department and in the Director of the Department of Mental Health for that department.

In view of the discussion above concerning providing board and living quarters to state employees as compensation, it is clear from the language used in Section 191.160, that board and living quarters furnished pursuant to said section is different from that which is furnished as a part of compensation to state

Mr. Edward A. Godar

employees. Therefore, when the directors of the Department of Social Services and the Department of Mental Health, as well as the directors of all the other departments, determine that it is for the good of the state and necessary for the proper performance of duties such board and living quarters shall be furnished "free of charge" to the employee. Thus, for example, when persons are required for the benefit of the state to be on a technical 24-hour duty, whether physicians or guards or other personnel, they may be furnished such board and living quarters.

In a situation where the board and living quarters is furnished as a condition of employment, it is our view that such benefits are not "salary." Whether the furnishing of room and board is for the good of the state and constitutes a condition of employment and thus is not salary, or whether it constitutes additional compensation and thus is salary, is to be determined by the directors of the departments.

It is also our view that for merit system departments, where such room and board is furnished as a condition of employment, the benefits are not "received by" the employee within the meaning of Section 36.140 and consequently are not to be considered in the determination of the pay plan for the classification. Similarly, such "benefits" are not, in our view, within the meaning of Personnel Advisory Board Rules 6.4(d) and (e), above quoted, because they are not salary. Finally, we recognize that the situation may exist where an employee is furnished "benefits" which are in part for the good of the state and in part considered "salary" by the department directors. In such a case that part which is considered "salary" should be taken into consideration by the Personnel Advisory Board in computing the pay plan for the classification.

We do not in this opinion purport to rule in any way on the question whether board and/or living quarters furnished as a condition of employment constitute salary, wages, earnings, income, or compensation insofar as income taxes or social security taxes are concerned.

In view of our holding, our Opinion No. 62, 1970 to Ulett, is withdrawn.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 93
9-9-69, Cason

January 27, 1975

OPINION LETTER NO. 42

Honorable Lawrence J. Lee
Missouri Senate, 3rd District
c/o Senate Post Office
State Capitol Building
Jefferson City, Missouri 65101



Dear Senator Lee:

This letter is in response to your request for an opinion.
In the request you have asked the following question:

"May a Public School District contract with a non-profit parochial institution to provide special educational services for handicapped children under House Bill Number 474 (effective August, 1974); and would such a contract between a Public School District and a non-profit parochial school whereby the non-profit parochial school provided the special educational services required under House Bill 474 be contrary to the provisions of Article I, Section 7 or Article IX, Section 8 of the Constitution of Missouri?"

After careful consideration of relevant legal authority and for the reasons stated in our letter to Dr. Harold P. Robb, Director of the Department of Mental Health, this date, copy enclosed, this office will presume that the answer to your question is in the affirmative unless and until a court of competent jurisdiction holds to the contrary.

Very truly yours,

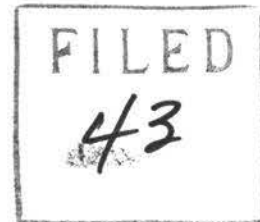
JOHN C. DANFORTH
Attorney General

Enclosure: Op. Ltr. No. 43 - 1975

January 27, 1975

OPINION LETTER NO. 43
Answer by letter-Klaffenbach

Harold P. Robb, M.D., Director
Department of Mental Health
Post Office Box 687
Jefferson City, Missouri 65101



Dear Dr. Robb:

This letter is in response to your question asking:

"Can the Department of Mental Health utilize appropriated funds to pay for the costs of care, treatment and education of its patients placed in a nursing home under Section 202.831 V.A.M.S., where the owner or operator of the nursing facility is a church or religious organization; . . ."

Section 202.831, RSMo Supp. 1973, provides in pertinent part:

"1. The head of a state mental facility, with the consent of the person responsible for the commitment of the patient or of one of the parents, if living, having been first obtained, may place any patient, except those committed as criminally insane, in a licensed boarding, or licensed nursing home or family home upon such terms and conditions as he deems proper when he believes that such family care would benefit the patient. . . ."

We are aware that it has been administrative practice since the enactment of Section 202.831 to place patients in qualified nursing homes regardless of the fact that some such homes are owned or operated by religious organizations and that such practice has existed for a long period of time. Similar practices

Harold P. Robb, M.D.

have existed in other areas, such as juvenile placements, and have been accepted without question.

In analyzing the legal questions raised by your question, we have exhaustively examined the Missouri and Federal Constitutions and statutes and court opinions. We have given sincere and in depth consideration to the various and myriad problems involved.

We are of the view that the legislature, in enacting Section 202.831 and related sections and in amending the same from time to time, must have been aware of the fact that a large number of such homes are connected in some way or another with religious groups and, in fact, that such services would not be so readily available if the placement facilities of such organizations were not utilized by the state to full advantage.

Further, in such premises, we do not believe that we are in a position to condemn the making of such placements as being unconstitutional. The courts have consistently followed the rule that only when there is a clear conflict between a legislative enactment and the Constitution are the courts warranted in declaring the law to be void. In the matter of Burris, 66 Mo. 442, 450 (1877); Borden Company v. Thomason, 353 S.W.2d 735, 743 (Mo. Banc 1962). We do not believe that the existing practices of the Department of Mental Health under Section 202.831 are so clearly in conflict with the Constitution as to warrant an opinion by this office that they are unlawful.

It is reasonably anticipated that litigation will arise with regard to this question or with respect to the question raised by the Honorable Lawrence J. Lee and answered this date (copy enclosed) concerning similar placements under the provisions of House Bill No. 474, First Regular Session, 77th General Assembly, relating to the education of the developmentally disabled and other handicapped children. In the event of such litigation, this office would have the obligation of defending the practices of state officials authorized under existing Missouri law.

Therefore, this office will presume that the answer to your question is in the affirmative unless and until a court of competent jurisdiction holds to the contrary.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Opinion Letter No. 42 - 1975



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

February 19, 1975

OPINION LETTER NO. 44

The Honorable Howard M. Garrett
State Representative, District 124
State Capitol Building - Room 315
Jefferson City, Missouri 65101

Dear Representative Garrett:

This letter is to acknowledge receipt of your request for an opinion from this office which reads as follows:

"Does Section 169-020 of the Revised Statutes of Missouri, Subsection 16, Subsection 1, require the Board of Trustees of the Public School Retirement System to report the market value of stock held at the end of the preceding fiscal year so that it will truly show the financial status of the system at the end of the preceding fiscal year.

"Does the above statutory provisions require distribution to the members of the system each year in a timely manner of the annual report.

"Does the above statutory provision require the secretary to send upon request the information as to the market value of the stock as it was at the end of the preceding fiscal year."

In connection with the above, subsection 16 of Section 169.020, RSMo Cum. Supp. 1973, provides as follows:

"The board of trustees shall keep a record of all its proceedings, which shall be open to public inspection. It shall prepare annually a report including the following:

"(1) A financial report in two parts, one showing the receipts and disbursements of the system during the preceding fiscal year, and one showing the financial status of the system at the end of the preceding fiscal year;

"(2) An actuarial report showing in balance-sheet form the actuarial status of the system at the time of the last actuarial valuation of its assets and liabilities.

"The reports shall be filed with the secretary and by him preserved and made available for public inspection."

An examination of the above statute reveals that among various reports, the board of trustees is required to prepare a report showing the financial status of the system at the end of the preceding fiscal year. In this regard, there is abundant authority for the proposition that in construing a statute, an important factor for consideration is the purpose or objective of the enactment. Garrard v. State Department of Public Health and Welfare, 375 S.W.2d 582 (Spr.Ct.App. 1964). Under such circumstances, it is our view that the purpose of the statute is to provide a report which reveals the "actual" financial status of the Retirement System. Therefore, in response to your first question, it is our opinion that subsection 16 of Section 169.020, RSMo Cum. Supp. 1973 requires the Board of Trustees of the Public School Retirement System to report the market value of stock held at the end of the preceding fiscal year.

In response to your second and third questions, it is our view that an examination of the foregoing statute does not require the board of trustees to distribute to the members of the system a copy of the annual report. However, it is our understanding that as a matter of courtesy the board of trustees sends the annual report to all school districts and extra copies

The Honorable Howard M. Garrett

-3-

are made available to members. It is also our understanding that your constituent has received the information as to the market value of the stock as it was at the end of the preceding fiscal year. In addition, we note that the annual report is available for public inspection by members of the Retirement System.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

April 30, 1975

OPINION LETTER NO. 46

JOHN C. DANFORTH
ATTORNEY GENERAL

Dr. Jack Cross, Commissioner
Department of Higher Education
600 Clark Avenue
Jefferson City, Missouri 65101

Dear Dr. Cross:

This letter is in response to your request for this office's opinion as to whether a public library district remains eligible for state aid grants if a public library tax of an amount greater than one mill has been approved at the time of the creation of the library and has since been reduced to a lesser amount but not below one mill.

Section 182.010, RSMo 1969, provided for a tax rate of at least one mill and not more than two mills on the dollar of assessed valuation for county library districts. This section has been modified by House Bill No. 1643, 77th General Assembly, to provide for a tax rate not to exceed twenty-five cents for each one hundred dollars of assessed valuation. You state that in recent years a number of library districts have been created with a tax rate larger than the minimum one mill at the time of their creation. Occasionally, local authorities have given consideration to a reduction of this rate, particularly when the assessed valuation of the taxing district has increased.

Section 181.060, subsection 2, RSMo 1969, which authorizes state aid to public library districts, provides, in pertinent part:

" . . . No grant shall be made to any public library if the rate of tax levied or the appropriation for the library should be decreased below the rate in force on December 31, 1946, or on the date of its establishment.

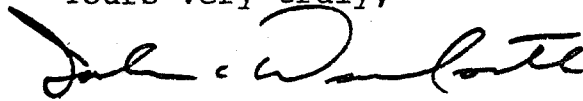
Dr. Jack Cross

Grants shall be made to any public library if a public library tax of at least one mill has been voted in accordance with sections 182.010 to 182.460, RSMo, or as authorized in section 137.030, RSMo, and is duly assessed and levied for the year preceding that in which the grant is made, or if the appropriation for the public library in any city of first class yields one dollar or more per capita for the previous year according to the population of the latest federal census." (Emphasis supplied)

It is well settled that the basic rule of statutory construction is to seek the legislative intent and, in so doing, words shall be given their plain and ordinary meaning. State ex rel. State Highway Commission v. Wiggins, 454 S.W.2d 899 (Mo.Banc 1970). We believe that the underlined portion of Section 181.060, RSMo 1969, is clear and that there is no ambiguity. If a library district reduces its tax rate below the rate established at its inception, regardless of the reason, in our opinion, such a district would be ineligible for continued state aid.

We enclose Opinion No. 72 rendered August 9, 1955, to Paxton P. Price, holding that Section 137.073 does not require a reduction of the library tax rate if such reduction would result in loss of state aid.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 72
8-9-55, Price

LIENS:

MECHANICS' LIENS:

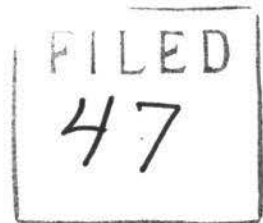
Only a contractor who deals directly with a consumer is required to provide the notice specified in

Section 429.010, House Bill 1251, 77th General Assembly. A subcontractor who further subcontracts the supplying of labor or materials is not required to provide notice. An original contractor supplying materials which its own employees install in the home of a consumer is required to give the notice provided for in Section 429.010.

OPINION NO. 47

January 15, 1975

Honorable Morris G. Westfall
State Representative, District 133
Rural Route 2
Halfway, Missouri 65663



Dear Representative Westfall:

This is in response to your request for an official opinion on the following questions:

"Is a firm who contracts with an original contractor to perform services or labor on, or supply materials for, an improvement referred to in Section 429.010, RSMo 1969 as amended 1974, and which itself will further subcontract for the supplying of materials or labor, have to give the Notice referred to in 429.010(1) RSMo 1969 as amended 1974.

"Is an original contractor which itself is the sole supplier of materials, and that will have its regular, salaried employees to install the materials contracted for, required to give the Notice referred to in Section 429.010(1) RSMo 1969 as amended 1974."

Section 429.010(1), House Bill 1251, 77th General Assembly, Second Regular Session, provides as follows:

"1. Every original contractor, who shall do or perform any work or labor upon, or furnish any material, fixtures, engine, boiler or

Honorable Morris G. Westfall

machinery for any building, erection or improvements upon land, or for repairing the same, under or by virtue of any contract shall provide to the person with whom the contract is made prior to receiving payment in any form of any kind from said person, (a) either at the time of the execution of the contract, (b) when the materials are delivered, (c) when the work is commenced, or (d) delivered with first invoice, a written notice which shall include the following disclosure language in ten point bold type:

NOTICE TO OWNER

FAILURE OF THIS CONTRACTOR TO PAY THOSE PERSONS SUPPLYING MATERIAL OR SERVICES TO COMPLETE THIS CONTRACT CAN RESULT IN THE FILING OF A MECHANIC'S LIEN ON THE PROPERTY WHICH IS THE SUBJECT OF THIS CONTRACT PURSUANT TO CHAPTER 429, RSMo. TO AVOID THIS RESULT YOU MAY ASK THIS CONTRACTOR FOR 'LIEN WAIVERS' FROM ALL PERSONS SUPPLYING MATERIAL OR SERVICES FOR THE WORK DESCRIBED IN THIS CONTRACT. FAILURE TO SECURE LIEN WAIVERS MAY RESULT IN YOUR PAYING FOR LABOR AND MATERIAL TWICE.

(a) Compliance with subsection 1 hereof shall be a condition precedent to the creation, existence or validity of any mechanic's lien in favor of such original contractor.

(b) Any original contractor who fails to provide the written notice set out in subsection 1. hereof shall be guilty of a misdemeanor and upon conviction shall be fined not less than \$500 nor more than \$1000." (Emphasis supplied).

Such section provides that only "original contractors" are required to provide the notice provided in Section 429.010. A firm which contracts with an original contractor to perform services, labor or supply materials for an improvement covered by Section 429.010 need not supply a notice to the consumer for whom the work is being done. A subcontractor who further subcontracts the supplying of materials or labor is not required to provide notice.

Honorable Morris G. Westfall

In response to your second question, an original contractor, who is itself the sole supplier of materials, who will have those materials installed by its own employees and who contracts directly with the consumer, must provide the notice set forth in Section 429.010.

CONCLUSION

It is the opinion of this office that only a contractor who deals directly with a consumer is required to provide the notice specified in Section 429.010, House Bill 1251, 77th General Assembly. A subcontractor who further subcontracts the supplying of labor or materials is not required to provide notice. An original contractor supplying materials which its own employees install in the home of a consumer is required to give the notice provided for in Section 429.010.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Harvey M. Tettlebaum.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

SCHOOLS:

SCHOOL DISTRICTS:

SCHOOL TRANSPORTATION:

DEPARTMENT OF MENTAL HEALTH:

(1) The cost of special educational services, including transportation, for a handicapped child who has been placed in a home by the Missouri Department of Mental Health, regardless of where those services are provided, is paid by the Department (under the provisions of Section 162.970, RSMo Supp. 1973). The Department of Mental Health is then reimbursed by the school district in which the parent or guardian resides or which would otherwise be responsible for special educational services for the child in an amount not to exceed the average sum produced per child by the local tax effort of the parent's district. (2) The cost of special educational services and of transportation for a handicapped child not admitted to the programs or facilities of the Missouri Department of Mental Health who resides in a home that provides care or treatment--whether the child is an offender or troubled, abandoned, or neglected--is the responsibility of the school district in which the home is located. If the responsible district does not provide those services itself, it must contract with another district or with a public or a private agency for those services and it must provide transportation to the place where the services are provided.

ment of Mental Health, regardless of where those services are provided, is paid by the Department (under the provisions of Section 162.970, RSMo Supp. 1973). The Department of Mental Health is then reimbursed by the school district in which the parent or guardian resides or which would otherwise be responsible for special educational services for the child in an amount not to exceed the average sum produced per child by the local tax effort of the parent's district. (2) The cost of special educational services and of transportation for a handicapped child not admitted to the programs or facilities of the Missouri Department of Mental Health who resides in a home that provides care or treatment--whether the child is an offender or troubled, abandoned, or neglected--is the responsibility of the school district in which the home is located. If the responsible district does not provide those services itself, it must contract with another district or with a public or a private agency for those services and it must provide transportation to the place where the services are provided.

OPINION NO. 48

June 25, 1975

Honorable Morris G. Westfall
Representative, District 133
Room 105, State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Westfall:

This official opinion is issued in response to your request for a ruling on whether, under the new law on special educational services (Sections 162.670-162.995, RSMo Supp. 1973), it is the school district (1) in which a child resides or (2) in which a child's parent or legal guardian resides that must pay tuition and transportation costs for special educational services when a handicapped child has to go to another district for education.

According to the facts that you supplied to us, two homes in your area provide care to children who are considered handicapped. Handicapped children have been defined as:

". . . children under the age of twenty-one years who have not completed an approved high

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school program and who, because of mental, physical, emotional or learning problems, require special educational services in order to develop to their maximum capacity;" (Section 162.675(2), RSMo Supp. 1973)

The first home, privately owned, provides care but not education for children; some of the children have been placed there by the Missouri Department of Mental Health, which pays for their care. The second home, located in another school district, is a nonprofit boys ranch.

" . . . Many of these boys have had encounters with the law and are considered to have mental blocks which prevent them from learning through the normal education process. . . ."

We understand that some of these boys have been referred to the home by the Missouri Department of Social Services, Division of Family Services, which pays for their care; others, by the juvenile court; still others may have been sent by their parents. Further, many of the boys " . . . have no parents or guardian and are not originally from the area." In both homes, some of the students may be suffering from nervous disorders. The foregoing facts will be used as the basis for this opinion.

The new special educational services law (House Bill No. 474) is designed to provide all handicapped children special educational services sufficient to meet their needs and to maximize their capabilities. Section 162.670, RSMo Supp. 1973. Thus, the intent of the legislature is to afford the handicapped child the same rights to a free education as a normal child, recognizing that the handicapped child has special needs that require special services. See Opinion No. 179, Mallory, September 18, 1974.

From the facts that you have provided, it appears (and we shall so assume) that the children in the two homes are or may be "handicapped," as defined in Section 162.675(2), RSMo Supp. 1973, quoted above, rather than "severely handicapped." Section 162.675(3) defines "severely handicapped children" as:

" . . . handicapped children under the age of twenty-one years who, because of the extent of the handicapping condition or conditions, as determined by competent professional evaluation, are unable to benefit from or meaningfully participate in

Honorable Morris G. Westfall

programs in the public schools of a regular or special nature;"

Handicapped Children Placed In Homes
By The Department Of Mental Health

Our Opinion No. 290, Robb, December 6, 1974, holds that the Department of Mental Health must provide or procure special educational services for handicapped children who are patients of the Department of Mental Health on community placement. A child who is placed in a home by the Department of Mental Health has been "admitted to the programs or facilities provided" by the Department, for purposes of determining whether or not the Department must pay the school district in which the home is located for special educational services. Thus, these services are considered as if they were "provided or procured" by the Department of Mental Health. Section 162.970, RSMo Supp. 1973. Under the provisions of Section 162.970, the Department of Mental Health must charge the school district of residence of the child's parent or guardian an amount equal to the local tax effort per child of the parent's district. We also held in Opinion No. 290, 1974, that the Department of Mental Health may use state community placement funds or federal funds to furnish transportation for children who are admitted to the Department's programs.

Thus, the cost of special educational services for a handicapped child who has been placed in a home by the Missouri Department of Mental Health, including the cost of transportation, is paid by the Department, which is reimbursed by the school district in which the parent or guardian resides in accordance with Section 162.970, RSMo Supp. 1973.

Handicapped Children Placed In Homes By Others

Normally it is the school district in which the student lives that is responsible for providing public education. In Opinion No. 26, Manford, April 8, 1971, we held that mentally retarded children sent by nonresident parents for treatment to a home for the mentally retarded are residents of the school district in which the home is located. As long as they have been sent to the home for treatment or care--rather than for education--the cost of their education must be paid by the school district in which the home is located, regardless of whether or not their parents are supporting them. Section 167.151.2, RSMo 1969, which is analyzed in Opinion No. 26, 1971, provides as follows:

"Orphan children, children with only one parent living, and children whose parents

Honorable Morris G. Westfall

do not contribute to their support--if the children are between the ages of six and twenty years and are unable to pay tuition--may attend the schools of any district in the state in which they have a permanent or temporary home without paying a tuition fee."

As we pointed out in Opinion No. 26, 1971, Missouri courts have recognized a distinction between "domicile" and "residence" for school purposes. Even though a child's domicile remains with his parents, his residence for school purposes is where he actually resides.

We later held in Opinion No. 27, McDaniel, March 9, 1973, that a child under the custody of the State Board of Training Schools [now the Missouri Department of Social Services, Division of Youth Services], who has been placed in a home--whether his own, a relative's, a foster or a group home--is entitled to attend school in the school district in which the home is located without payment of tuition. See also Section 167.151.2, RSMo 1969, quoted above.

If a school district is unable to provide special educational services to each handicapped child residing in such homes as required in Sections 162.670-162.995, RSMo Supp. 1973, the district must contract with another district or a public or a private agency for the special educational services, as specified in Section 162.705, RSMo Supp. 1973. The new law on special educational services further requires that transportation must be provided:

"The district responsible for furnishing special educational services shall provide necessary transportation for all handicapped children residing within the district, including transportation to and from contracted day classes, notwithstanding the provisions of sections 162.621 and 167.231, RSMo."
(Section 162.710, RSMo Supp. 1973)

Thus, the cost of special educational services and of transportation for a handicapped child placed in a home by a person or an agency other than the Missouri Department of Mental Health is paid by the school district in which the home is located.

CONCLUSION

It is the opinion of this office that:

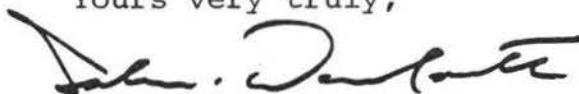
Honorable Morris G. Westfall

(1) The cost of special educational services, including transportation, for a handicapped child who has been placed in a home by the Missouri Department of Mental Health, regardless of where those services are provided, is paid by the Department (under the provisions of Section 162.970, RSMo Supp. 1973). The Department of Mental Health is then reimbursed by the school district in which the parent or guardian resides or which would otherwise be responsible for special educational services for the child in an amount not to exceed the average sum produced per child by the local tax effort of the parent's district.

(2) The cost of special educational services and of transportation for a handicapped child not admitted to the programs or facilities of the Missouri Department of Mental Health who resides in a home that provides care or treatment--whether the child is an offender or troubled, abandoned, or neglected--is the responsibility of the school district in which the home is located. If the responsible district does not provide those services itself, it must contract with another district or with a public or a private agency for those services and it must provide transportation to the place where the services are provided.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hortense K. Snower.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 179
9-18-74, Mallory

Op. No. 290
12-6-74, Robb

Op. No. 26
4-8-71, Manford

Op. No. 27
3-9-73, McDaniel

CONVICTS: Section 549.071, RSMo 1969, author-
PROBATION AND PAROLE: izes courts to grant extensions
of paroles subject to statutory
restrictions and authorizes such courts to grant terms of parole
which extend beyond the original expiration date of a parolee's
sentence.

OPINION NO. 50

March 12, 1975



Mr. W. R. Vermillion, Chairman
Board of Probation and Parole
Post Office Box 267
Jefferson City, Missouri 65101

Dear Mr. Vermillion:

This opinion is in response to a request for an interpretation of Section 549.071, RSMo 1969, in the light of two different issues. The first question deals with the issue of whether the statute gives a judge the authority to extend the "parole period" of an individual on judicial parole.

As is evident from the definition of the terms "probation" and "parole" in Section 549.058(2) and (3), RSMo 1969, the difference between these two terms lies in whether the sentence imposed upon a defendant has in any part been executed before that defendant is released on the conditions imposed by the court. When no part of the sentence has been served, the defendant is considered to be on "probation". However, when a part of the sentence has been executed, the defendant is considered to have been "paroled". Although these terms have been used interchangeably by the courts in the past, the legislature wrote the section of the statutes under the heading "Judicial Paroles" in a manner which consistently differentiates the two terms. As a result, Section 549.071, RSMo, 1969, is divided into two different parts, the first dealing with judicial probation and the second dealing with judicial parole.

Section 549.071, RSMo 1969, is as follows:

"1. When any person of previous good character is convicted of any crime and commitment to the state department of corrections or other confinement or fine is assessed as

Mr. W. R. Vermillion

the punishment therefor, the court before whom the conviction was had, if satisfied that the defendant, if permitted to go at large, would not again violate the law, may in its discretion, by order of record, suspend the imposition of sentence or may pronounce sentence and suspend the execution thereof and may also place the defendant on probation upon such conditions as the court sees fit to impose. The probation shall be for a specific term which shall be stipulated in the order of record. In the case of a felony offense no probation under this chapter shall be granted for a term of less than one year, and no probation shall be granted for a term of longer than five years. In the case of a misdemeanor offense no probation shall be granted for a term of longer than two years. The court may extend the term of the probation, but no more than one extension of any probation may be ordered.

"2. The courts, subject to the restrictions herein provided, may in their discretion, when satisfied that any person against whom a fine has been assessed or a jail sentence imposed, will, if permitted to go at large, not again violate the law, parole the defendant upon such conditions as the court sees fit to impose." [Emphasis added].

Section 1 of the statute deals with the criteria under which a court may grant a probation and also allows the court the option of granting the probation before or after imposition of sentence. This part of the statute also contains several restrictions on the court's power to grant probation, including the requirement that the probation be for a "specific term"; the requirement that there be minimum and maximum terms for felony and misdemeanor offenses; and the restriction that the court may grant only one extension of the original period of probation. Section 2 of the statute deals with judicial paroles and contains the criteria under which they may be granted. Section 2 also incorporates provisions of Section 1 of the statute by stating that the court's power to grant judicial parole is "subject to the restrictions herein provided, . . ." Restrictions in Section 1 of Section 549.071, RSMo 1969, which would apply to judicial paroles would be the requirements that the parole be set for a "specific term" and that there be minimum and maximum periods at which the terms can be set for felony and misdemeanor offenses. The question

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with which we are concerned is whether this phrase incorporates also the restriction that the court may grant no more than one extension of a parole and, therefore, by way of implication, grants the court the power to extend terms of parole as well as terms of probation.

The statute must be construed in the light of the purpose for which it was enacted. Missouri courts have long recognized that the probation and parole statutes have as their purpose the reformation of those convicted of crimes. Ex parte Mounce, 307 Mo. 40, 269 S.W. 385, 387 (Mo. Banc 1925). The purpose is "to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping that individual." Morrissey v. Brewer, 408 U.S. 471, 472, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). The need for a flexible approach to be taken in regard to the duration of terms of parole has been emphasized by Missouri courts. Ex parte Mounce, supra, at 387. In light of this, the statutes under the heading "Judicial Paroles" should be construed in a manner which helps effectuate their reformatory purpose.

The statutes provide that the court may grant an absolute discharge at the end of the period of judicial parole only when it is satisfied that "the reformation of the defendant is complete and that he will not again violate the law, . . ." Section 549.111.1, RSMo 1969. Without the power to extend a period of judicial parole, the court would have no flexibility in dealing with a situation in which a parolee has had those types of adjustment problems which would require his continued supervision but which do not amount to violations of his conditions of parole nor indicate that he will again violate the law. Without the power to extend his period of parole, the court would be faced with the alternatives of reincarcerating him or granting him an absolute discharge. Neither of these alternatives would assist the parolee in working out his problems but in most cases would serve as a setback to the parolee and to the interest of society in having him become a law-abiding citizen.

It is, therefore, reasonable to interpret the phrase, "subject to the restrictions herein provided, . . ." in Section 549.071.2, RSMo 1969, as indicating a legislative intent to grant courts the power to extend judicial parole periods in the same manner in which they extend terms of judicial probation. This reading of the statute is consistent with the terms of Section 549.141, RSMo 1969, which speaks of court actions, including that of extension, as applying to court orders placing defendants upon parole as well as upon probation.

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Moreover, it is evident from a reading of Smith v. Carnes, 481 S.W.2d 242 (Mo. Banc 1972), that the Supreme Court of Missouri has interpreted Section 549.071, RSMo 1969, as granting trial courts the power to extend terms of judicial parole as well as terms of judicial probation. The court's opinion concerned the issue of whether a probationer's initial term of probation along with an extension of that initial term may exceed that period of time which the statute sets forth as being the maximum period during which a defendant may stay on probation. The court held that the provision in the statute prohibiting probation for a term longer than that specified in the statute had reference to the entire period of time that the court is authorized to keep a defendant on probation and not merely to the initial period designated by the court at the outset of the probationary period. It is significant that in the course of its decision the court spoke of both probation and parole as being involved in this issue.

" . . . The provisions of the present law, §549.071, RSMo 1969, do not provide that the time allowed to the court for keeping a misdemeanor on probation or parole is to be counted from the date of the extension of the initial period but, to the contrary, provide that the probation or parole itself cannot be for a longer period than two years. In short, the present law does not allow for the two-year limitation to commence to run at any point in time other than that point in time when the misdemeanor is first placed on probation or parole." [Emphasis added]. Smith v. Carnes, supra, at 245.

Even though the court was not addressing itself to the specific issue of whether the trial court had the power to grant an extension of a judicial parole, it is evident from a reading of the decision that the court felt that the issue to which it was addressing itself had ramifications for extensions of judicial paroles as well as for extensions of judicial probations.

From the foregoing considerations, it is the opinion of this office that Section 549.071, RSMo 1969, does grant those courts authorized by Section 549.061, RSMo 1969, to place defendants on judicial parole the power to extend the initial term of the parole subject to the restriction that it may not grant more than one such extension.

Mr. W. R. Vermillion

The second question with which we are concerned involves the issue of whether a court may grant judicial parole under Section 549.071, RSMo 1969, for a term which would run beyond the expiration date of the sentence from which the defendant is being paroled. In other words, we are concerned with the following hypothetical situation: a defendant is sentenced to the county jail for one year. After the defendant has served six months of the sentence, the court grants him parole for a term of two years. Obviously, this two year term of parole would carry eighteen months beyond the end of the original sentence. Does the court have the power to extend the defendant's parole period beyond the time in which he would have been released had he served out his full sentence?

The term of years during which a defendant may be paroled by a court is not in any way controlled by the number of years for which he was originally sentenced. It was established by the Supreme Court of Missouri in Ex parte Mounce, supra, at 387, that restrictions on the duration of probation and parole are controlled exclusively by statutory language. The Supreme Court was addressing itself to a situation in which a man had been sentenced to two years imprisonment and released on what is now termed probation. The statutes in effect at that time provided for a maximum period during which such probation could be continued. However, there was no requirement that the trial court set probation at a specific term of years. The trial court revoked the defendant's probation more than two years after he was sentenced but before the maximum term for his probation had run. Defendant applied for a writ of habeas corpus on the ground that he could not be sent to prison to serve his sentence after the time for the original sentence expired. The court held that a probationer could be sent to prison to begin serving his term because there was no statutory language to the effect that "there was any relation whatever between the time during which a parole [probation] may be continued, and the length of the term of imprisonment imposed in the sentence, from the execution of which a defendant may be paroled [placed on probation]." Id. at 387.

At the present time, the statutes concerning judicial paroles contain no language establishing a correlation between the term of imprisonment and term of parole. Section 549.058 through Section 549.197, RSMo 1969. The only restrictions placed on the duration of parole are found in Section 549.071, RSMo 1969, which sets forth the minimum and maximum terms for which a defendant may be paroled. Because the power to parole can be limited only by statutory language, the absence of any provision in our

Mr. W. R. Vermillion

statutes relating the duration of parole to the term of imprisonment indicates that the trial court may set forth a term of parole which extends beyond the expiration date of the original sentence.

This conclusion is in harmony with the purposes behind a sentence of imprisonment and a term of parole. Imprisonment is for the purpose of punishment and the legislature has set forth in the statutes the maximum term beyond which an individual should be punished for a particular crime. It is a general rule that the maximum period of punishment normally varies in proportion to the gravity of the crime. However, parole is not for the purpose of punishment but rather serves the purpose of reforming the defendant. Ex parte Mounce, supra, at 387. It is recognized that the reformation of a defendant may take longer than the number of years provided for his punishment. Id. at 387. For instance, even though a defendant may have committed a crime which merited his being punished for two years in prison, it might well take three years to accomplish his reformation.

The divergent purposes of sentencing and of parole are more recently expressed in McCulley v. State, 486 S.W.2d 419 (Mo. 1972). In that case, the Supreme Court of Missouri dealt with the problem of whether the second sentence which a defendant had received for a particular crime was more severe than the first sentence. The defendant had previously pled guilty to a felony and had received a sentence of two years imprisonment. However, after serving part of that sentence, he was allowed to withdraw his guilty plea. Subsequently he decided to plead guilty again. On his second guilty plea, he was sentenced to seven (7) years but given immediate probation. The issue concerned whether the second sentence was more severe than the first and whether it would thereby serve to punish the defendant for attacking his first guilty plea and inhibit convicted persons from attempting to attack their convictions.

Even though the court was concerned with an issue different from the one with which we are concerned here, it provided a useful analysis of the differing concepts of sentence and parole. The court held that the sentence on a conviction or guilty plea is the legal consequence of such guilt. Parole or probation, however, is not a part of the sentence imposed upon a defendant. Id. at 423. A sentence does not include as part of it ameliorating orders such as probation or parole. Such orders neither lengthen nor shorten the sentence. This is entirely consistent with the view that the sentence is for purposes of punishment and the parole is for purposes of reformation. Therefore, whether we consider the question from a viewpoint of statutory language or whether we consider it from the viewpoint of the respective

Mr. W. R. Vermillion

purposes of sentencing and parole, it is evident that the length of a prisoner's sentence has nothing to do with the duration of his term of parole. It is, therefore, the opinion of this office that a court may grant an initial term of parole or an extension of that initial term pursuant to Section 549.071.2, RSMo 1969, which would retain the defendant on parole for a period of time beyond the original expiration date of his sentence.

CONCLUSION

Therefore, it is the opinion of this office that Section 549.071, RSMo 1969, authorizes courts to grant extensions of paroles subject to statutory restrictions and authorizes such courts to grant terms of parole which extend beyond the original expiration date of a parolee's sentence.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul Robert Otto.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH
ATTORNEY GENERAL

February 10, 1975

OPINION LETTER NO. 51

Honorable D. R. Osbourn
Representative, District 14
% House Post Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Osbourn:

This is in response to your request for an opinion from this office as follows:

"Regarding Section 67.400 of the Missouri Revised Statutes--what type of punishment or penalty is contemplated by this state statute.

"This question arises from the city attorney's office in Louisiana. Because they have many buildings and structures that are not in compliance with Section 67.400, we are interested in finding out what measures might be taken to enforce this section of the statutes."

Louisiana is a third class city.

Section 67.400, RSMo, to which you refer, provides as follows:

"The governing body of any city, town, village, or county having a charter form of government may enact ordinances to provide for vacation and the mandatory demolition of buildings and structures or mandatory repair and maintenance of buildings or structures within the corporate limits of

Honorable D. R. Osbourn

the city, town or village which are detrimental to the health, safety or welfare of the residents and declared to be a public nuisance."

Sections 67.400 to 67.450, RSMo, were enacted in 1969 by House Bill No. 60.

Section 67.420, RSMo, provides:

"Any ordinance adopted may provide that the failure to comply with the notice of declaration of nuisance within a reasonable time or failure to proceed continuously without unnecessary delay will be punishable as set forth in the ordinance."

You enclose with your opinion request a copy of an ordinance enacted by the city of Louisiana in regard to this matter. Section 7 of the ordinance provides as follows:

"Section 7. PENALTY FOR VIOLATION.
Failure to comply with the notice of declaration within the time specified or failure to proceed continuously without unnecessary delay, shall be punishable in the Police Court by a fine of not more than

\$100.00 or by imprisonment in the City Jail not exceeding 30 days or by both such fine and imprisonment. Each day of noncompliance with the notice of declaration of nuisance shall be considered a separate offense."

In substance you inquire whether the penalty provision is a valid ordinance of the city. Not passing on the validity of the other provisions of the ordinance, it is our view that the city of Louisiana has authority to enact an ordinance providing for punishment by a fine or not more than \$100. or by imprisonment in the city jail not exceeding 30 days or by both such fine and imprisonment for failure to comply with the provisions of the ordinances enacted by the city regarding this matter. Section 77.590, RSMo Supp. 1973, provides that the council of a city of the third class shall have the power to enact and make all necessary ordinances, rules and regulations; and they shall also have power to enact and make all such ordinances and rules, not inconsistent with the laws of the state, as may be expedient for maintaining the peace and good government and welfare of the city, and its trade and commerce; and all ordinances may be enforced

Honorable D. R. Osbourn

by prescribing and inflicting upon inhabitants or the persons violating the same, such fine not exceeding \$500, and such imprisonment not exceed three months, or both such fine and imprisonment, as may be just for any offense, recoverable with costs of suit, together with judgment of imprisonment, until the fine and costs are paid.

It is our view that a city of the third class has authority to enact an ordinance providing for a penalty by a fine of not more than \$500 or by imprisonment in the city jail not exceeding 30 days, or by both such fine and imprisonment, for a person who fails to comply with the provisions of ordinances enacted under Sections 67.400 to 67.450, RSMo, in regard to the demolition or repair of buildings and structures which are detrimental to the health, safety, and welfare of the residents of the city.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

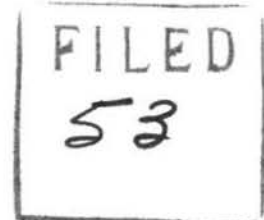
JOHN C. DANFORTH
Attorney General

COMPENSATION: (1) Department heads have authority under Senate Bill No. 1, 77th General Assembly, to set the salary of division and other administrative positions subject to appropriations therefor. (2) The salary of the Adjutant General established by the first departmental plan filed before June 30, 1974, providing for a salary of \$18,000.00 per year for the Adjutant General, constitutes the salary which the Adjutant General may be paid at present. The salary may be changed by a subsequent departmental plan.

OPINION NO. 53

March 18, 1975

Mr. Michael D. Garrett, Director
Department of Public Safety
Post Office Box 749
Jefferson City, Missouri 65101



Dear Mr. Garrett:

This is in answer to your opinion request reading as follows:

"Do I have the authority, as Director of the Department of Public Safety, to increase the salary of the Adjutant General? If not, what is the salary level for the Adjutant General for fiscal year 1975?"

Section 41.140, RSMo Supp. 1973, provides in part, as follows:

"2. The adjutant general shall have the rank designated by the governor and shall receive eighteen thousand dollars per annum, . . ."

Such section purports to set the salary of the Adjutant General and the question is whether or not you are bound by such statutory provision or whether you have been given authority to set the salary.

Section 11.10 of C.C.S.H.C.S.S.C.S.S.B. No. 1, First Extraordinary Session, 77th General Assembly, hereinafter referred to as Senate Bill No. 1, provides as follows:

Mr. Michael D. Garrett

"10. The office of adjutant general and the state militia are assigned to the department of public safety; provided however nothing herein shall be construed to interfere with the powers and duties of the governor as provided in Article IV, Section 6 of the Constitution of the state of Missouri or chapter 41, RSMo."

Since the office of Adjutant General was not transferred by a type I, II or III transfer to the Department of Public Safety, such transfer constitutes a "specific type" transfer as defined in Section 1.7(1)(d) of Senate Bill No. 1. A "specific type" transfer is defined therein as one other than a type I, II or III transfer. Senate Bill No. 1 does not specifically provide what the effect of a "specific type" transfer will be. However, a "specific type" transfer does undoubtedly place within the Department of Public Safety the office of the Adjutant General.

Section 1.6(2) of Senate Bill No. 1, providing for departmental plans, provides in part, as follows:

". . . The plan shall provide for the level of compensation for division and other administrative positions, subject to appropriations therefor. . . ."

Section 1.6(2) also provides that the head of each department is to establish the internal organization of the department and allocate and reallocate duties and functions to promote economic and efficient administration and operation of the department. It is our view that in carrying out this admonition of the legislature the above quoted provision authorizes the head of each department in the plans filed, the first of which was to be filed before June 30, 1974, to determine the level of compensation for division and other administrative positions subject to appropriations therefor.

The setting of the salary of the Adjutant General in no way interferes with the power and duties of the Governor provided in Section 6 of Article IV of the Constitution, which provides that the Governor shall be commander in chief of the militia, or the power granted the Governor in Chapter 41, RSMo, which gives the Governor general control of the militia but does not authorize the Governor to set the salary of the Adjutant General.

It is our view that authority to set salaries of division heads and administrative positions is given to department heads

Mr. Michael D. Garrett

by Section 1.6(2) of Senate Bill No. 1, and that any salaries that are set by department heads for division and other administrative positions will prevail over any statutory provisions enacted and effective prior to the effective date of the Reorganization Bill.

We note that the departmental plan submitted by the director of the Department of Public Safety before June 30, 1974, provided for a salary of \$18,000.00 for the Adjutant General. Section 4.115 of C.C.S.H.B. No. 1004, Second Regular Session of the 77th General Assembly, provides an appropriation for the salary of the Adjutant General of \$20,000.00.

Generally, the courts of Missouri and this office in numerous official opinions have consistently held that any portion of an appropriation bill which in effect would constitute general legislation is in violation of Article III, Section 23 of the Missouri Constitution. See State ex rel. Davis v. Smith, 75 S.W.2d 828 (Mo.Banc 1934); State ex rel. Gaines v. Canada, 113 S.W.2d 783 (Mo.Banc 1937), reversed on other grounds 305 U.S. 337; and particularly State ex rel. Hueller v. Thompson, 289 S.W. 338 (Mo.Banc 1926). It appears therefore that the General Assembly could not by an appropriation act change the salary set in the first departmental plan of the Department of Public Safety.

However, as pointed out above, the director of the Department of Public Safety does have the power in subsequent departmental plans to set a different salary for the Adjutant General subject to appropriations therefor.

CONCLUSION

It is the opinion of this office that (1) department heads have authority under Senate Bill No. 1 of the 77th General Assembly to set the salary of division and other administrative positions subject to appropriations therefor. (2) The salary of the Adjutant General established by the first departmental plan filed before June 30, 1974, providing for a salary of \$18,000.00 per year for the Adjutant General, constitutes the salary which the Adjutant General may be paid at present. The salary may be changed by a subsequent departmental plan.

The foregoing opinion, which I hereby approve, was prepared by my assistant, C. B. Burns, Jr.

Very truly yours,

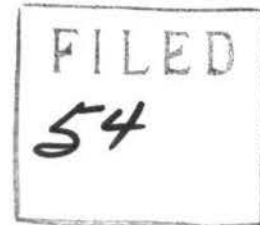


JOHN C. DANFORTH
Attorney General

January 6, 1975

OPINION LETTER NO. 54
Answer by letter-Klaffenbach

Honorable Richard J. DeCoster
Representative, District 1
Room 407, State Capitol Building
Jefferson City, Missouri 65101



Dear Representative DeCoster:

This letter is in response to your question asking our opinion concerning the residency requirements of policemen in fourth class cities. We understand your question primarily concerns whether or not police officers have to be residents of the state of Missouri.

The residency requirements of regular policemen are set out in the following sections.

Section 562.210, RSMo, provides:

"Hereafter no sheriff in this state shall appoint any under sheriff or deputy sheriff except the person so appointed shall be, at the time of his appointment, a bona fide resident of the state."

Section 562.220, RSMo, provides:

"The mayor, chief of police and members of the board of police commissioners of any city in this state shall be governed by the same restrictions and subject to the same penalties as a sheriff of any county, under the provisions of section 562.210."

Section 562.230, RSMo, provides:

Honorable Richard J. DeCoster

"Any sheriff of any county, or mayor, chief of police or member of the board of police commissioners of any city, now holding office or hereafter elected to any such office, who shall knowingly violate any of the provisions of sections 562.210 and 562.220, shall be punished by imprisonment in the county jail for not less than three months nor more than one year."

Further, we have held in Opinion No. 106, 1972, copy enclosed, that Article VII, Section 8, Missouri Constitution, requires that a city marshal of a town or a fourth class city must be a citizen of the United States and must have resided in this state one year next preceding his election or appointment. Section 79.250, RSMo, applicable to fourth class cities provides in part as follows:

"All officers elected or appointed to offices under the city government shall be qualified voters under the laws and constitution of this state and the ordinances of the city except that appointed police officers, the city attorney, and other employees having only ministerial duties need not be registered voters of the city. . . ."

This constitutes legislative recognition that policemen are "officers." Since fourth class city policemen are "officers," the holding in Opinion No. 106, 1972, is applicable to such policemen.

With respect to special deputies or policemen, Section 542.190, RSMo, provides:

"No sheriff of a county, mayor of a city or other private person authorized by law to appoint special deputies, marshals or policemen in this state to preserve the public peace and quell public disturbances, shall appoint as special deputies, marshals or policemen any person who is not a resident of this state and who has not been a resident of this state for at least three years prior to his appointment."

Honorable Richard J. DeCoster

We conclude that such police officers therefore must meet the requirements set out above.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 106
11-9-72, Cox



JOHN C. DANFORTH
ATTORNEY GENERAL

**OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY**

May 20, 1975

OPINION LETTER NO. 56

Mr. Alfred C. Sikes, Director
Department of Consumer Affairs,
Regulation and Licensing
505 Missouri Boulevard
Jefferson City, Missouri 65101

Dear Mr. Sikes:

This is in response to your request for an opinion on the following question:

"Does the Office of Athletics have the responsibility and authority to enforce its rules and regulations, to collect license and permit fees, and to assess the percentage tax on the proceeds of wrestling exhibitions conducted for the purpose of television filming when the audience does not pay an admission fee? And, were no audience permitted, would the same responsibility and authority prevail?"

By virtue of the Reorganization Act, the functions previously performed by the State Athletic Commission are now vested in the Office of Athletics, Division of Professional Registration, Department of Consumer Affairs, Regulation and Licensing. Pursuant to Section 317.020, the Office of Athletics has general charge of supervision of all wrestling exhibitions held in the state of Missouri.

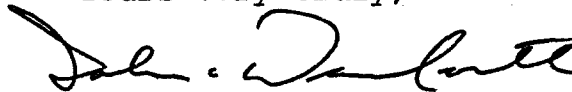
Section 317.050 makes it a misdemeanor to conduct a public wrestling exhibition without a license. We are enclosing Opinion No. 19 rendered June 11, 1953, to Bert Cooper and Opinion No. 71 rendered September 16, 1959, to Charles W. Pian, which hold that what is now the Office of Athletics has authority over wrestling matches only where the wrestlers are paid and where there is an admission charge. These opinions are still applicable to wrestling matches which are not televised.

Mr. Alfred C. Sikes

However, it is our view that wrestling matches which are televised are "public" as such term is used in Section 317.050, RSMo, which provides that it shall be a misdemeanor to engage in a public boxing, sparring, or wrestling match unless a license has been granted by the Office of Athletics, and is an "exhibition" as such term is used in Section 317.020, RSMo, which requires that a license be obtained before a boxing, sparring, or wrestling exhibition is conducted. Subsection 4 of Section 317.020 provides for a license fee of ten dollars and provides that five percent of the gross receipts derived from the sale of television rights or privileges of boxing, sparring, or wrestling matches shall be paid by the license holder.

It is our view that wrestling matches which are televised are "public" matches and are "exhibitions" because of the fact that through television they are available for viewing by the entire television audience. Since the fact that the wrestling matches are televised makes them "public" and "exhibitions," it is immaterial whether or not there are spectators actually physically present at the televised wrestling matches.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 19
6-11-53, Cooper

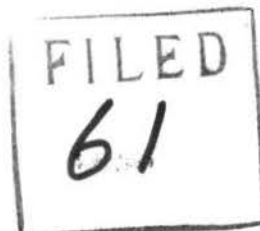
Op. No. 71
9-16-59, Pian

January 23, 1975

Op. No. 140-1976 should always be
sent with this opinion.

OPINION LETTER NO. 61
Answer by Letter - Klaffenbach

Honorable Frank Bild
State Senator, 15th District
c/o Senate Post Office
State Capitol Building
Jefferson City, Missouri 65101



Dear Senator Bild:

This letter is in response to your question asking:

"May a second class county contribute to the cost of a plan, including a plan underwritten by insurance, for furnishing all or a part of hospitalization or medical expenses, life insurance, or similar benefits as a part of the compensation of its employees, and to appropriate and utilize its revenues and other available funds for those purposes?"

We note that Section 49.277, RSMo, provides that a county court in counties of the first class not having a charter form of government may, as a part of the compensation of its employees, contribute to the cost of a plan, including a plan underwritten by insurance, for furnishing all or a part of hospitalization or medical expenses, life insurance, or similar benefits for its employees. We find no such similar statutory authority for a county of the second class.

We believe, however, that our Opinions No. 93-1969 and No. 11-1971, which are enclosed and which are self-explanatory, answer your question.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures

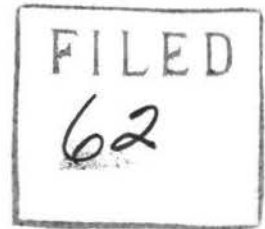
SAVINGS AND LOAN:
DEPOSITARIES:
SCHOOL DISTRICTS:
SCHOOLS:

Qualifying school districts may place certain funds in savings accounts or certificates of deposit in insured savings and loan associations under the provisions of Section 369.194, RSMo Supp. 1973 and Section 165.051, RSMo.

OPINION NO. 62

March 19, 1975

Dr. Arthur L. Mallory
Commissioner, Department of Elementary
and Secondary Education
6th Floor, Jefferson Building
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This opinion is in response to your inquiry asking:

"May school boards deposit district funds in accounts with savings and loan associations? If they may do so, what type of accounts may be opened and what restrictions are applicable?"

You further state that:

"Since the Federal Home Loan Bank Board has promulgated new rules in accordance with provisions of P.L. 93-495 increasing the insured investment of funds of political subdivisions to \$100,000, numerous inquiries have been received as to the effect the new regulations have on school districts. This has given rise to a more basic question: May school boards deposit district funds in accounts with savings and loan associations?"

Section 165.051, RSMo, with respect to the investment of surplus funds, provides:

"If any school district has money in the teachers', incidental, building, or debt service fund which will not be needed for a period

Dr. Arthur L. Mallory

of at least six months for the purpose for which the money was received, the school board in districts other than common school districts, and the county court upon the written application of the board in common school districts, if it deems it advisable, may invest the funds in either open time deposits for ninety days or certificates of deposit in a depository selected by the board or the court, if the depository has deposited securities under the provisions of sections 110.010 and 110.020, RSMo; or in bonds, redeemable at maturity at par, of the state of Missouri, of the United States, or of any wholly-owned corporation of the United States; or in other short term obligations of the United States. No open time deposits shall be made or bonds purchased to mature beyond the date that the funds are needed for the purpose for which they were received by the school district. No funds shall be invested in any district which does not provide a school term of nine months. Interest accruing from the investment of the surplus funds in such deposits or bonds shall be credited to the fund from which the money was invested."

Section 369.194, subsection 1, RSMo Supp. 1973, provides:

"Savings accounts in insured associations are legal and proper investments or depositories for fiduciaries of every kind and nature, all political subdivisions or instrumentalities of this state, insurance companies, business and nonprofit corporations, charitable or educational corporations or associations, all financial institutions of every kind and character, all pension, endowment and scholarship funds both public and private, and each and all of them may invest funds in savings accounts in such associations. The supervisor shall by regulation permit associations to pledge funds or assets in connection with the investment of public funds in savings accounts of associations, and may provide that savings accounts in associations shall be legal investments for any persons, firms, corporations

Dr. Arthur L. Mallory

or entities not herein specifically referred to."

Section 369.194 authorizes savings and loan associations to be depositaries for school districts. It is our understanding that the current regulations of the Division of Savings and Loan Supervision, Department of Consumer Affairs, Regulation and Licensing, respecting savings and loan associations treat both "savings accounts" and "certificates of deposit" as "savings accounts." Regulation Forty-74.

Section 165.051 authorizes investments by certain school districts in open time deposits for ninety days or "certificates of deposit" in banking institutions and Section 369.194 authorizes savings accounts in "insured associations." Investment in "open time deposits for ninety days or certificates of deposit" in banking institutions must be secured under Section 110.010, RSMo Supp. 1973, and under Section 110.020, RSMo Supp. 1973, to the value of one hundred percent of the actual amount of the funds on deposit with the depository, less the amount, if any, insured by the Federal Deposit Insurance Corporation.

Savings accounts which are authorized in savings and loan associations under Section 369.194, must be in "insured" savings and loan associations, that is, those associations insured by the Federal Savings and Loan Insurance Corporation. In the absence of any other applicable language, and we find none, we take this to mean that such accounts must be insured in full and that, in view of the particular reference in such section to "insured" savings and loan associations, the requirements of Section 110.010, respecting security, was not intended to be applicable to savings and loan accounts up to the amount of insurance coverage.

It is further our view that "investments" in insured savings and loan association accounts, certificates, or funds placed in savings and loan associations which have been selected as depositaries, while not subject to such security requirements to the extent of the insurance, are subject to such security requirements to the extent that such investments or funds placed in savings and loan associations selected as depositaries exceed the insured maximum.

We are also of the view that the reference in Section 165.051 to "open time deposits for ninety days" is not applicable to savings and loan accounts but that the provisions of Section 165.051, relating to the requirement that funds placed in accounts must be funds which are not needed for six months, is applicable.

Dr. Arthur L. Mallory

CONCLUSION

It is the opinion of this office that qualifying school districts may place certain funds in savings accounts or certificates of deposit in insured savings and loan associations under the provisions of Section 369.194, RSMo Supp. 1973 and Section 165.051, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

STATE AUDITOR:

valuation of tangible personal property although Senate Bill 333, 77th General Assembly, Second Regular Session, excludes household goods from taxation beginning January 1975.

March 31, 1975

FILED
63

This opinion is in response to the question asked by your predecessor, stated as follows:

It was further stated that:

"Starting January 1, 1975, the tax base for state, county, or local purposes will not include household goods, furniture, wearing apparel and articles of personal use and adornment. Section 137.100 RSMo 1974. The amount of indebtedness that a city, county,

Honorable George W. Lehr

or political subdivision may assume is a percentage of the taxable tangible property within its boundaries. The limitation of the indebtedness is described in the Missouri Constitution in Article VI, Section 26(b) as 'an amount not to exceed five percent of the value of taxable tangible property therein as shown by the last completed assessment for state or county purposes.' The Constitutional Sections which raise the percentage do not elaborate further on what is taxable tangible property.

"The elimination of household goods from the tax base has raised a serious problem with regard to the method for determining the valuation of property for bond elections in calendar year 1975. It is arguable that the amount of household goods, furniture, wearing apparel and articles of personal use and adornment assessed in 1974 should be removed from the valuation used for bond elections in 1975. The new section 137.100 takes effect on January 1, 1975. However, since the constitution refers to the last completed assessment, and since valuations for bond elections in 1975 must be based upon assessments completed in 1974, it is also arguable that the soon to be eliminated items be included for the 1975 elections."

The amendment referred to is Senate Bill 333, 77th General Assembly, Second Regular Session.

Section 26(b) of Article VI of the Missouri Constitution, provides:

"Any county, city, incorporated town or village or other political corporation or subdivision of the state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount not to exceed five per cent of the value of taxable tangible property therein as shown by the last completed assessment for state or county purposes, except that

Honorable George W. Lehr

a school district by a vote of two-thirds of the qualified electors voting thereon may become indebted in an amount not to exceed ten per cent of the value of such taxable tangible property."

We find no precedent with respect to this question.

Under Section 108.240, RSMo, the state auditor has the function of registering bonds of certain political subdivisions and must certify that the bonds issued have complied with all the conditions of laws.

We note that the constitutional provision cited is clear and unequivocal and does not provide for adjustments because of present legislative enactments affecting assessments. It is therefore our view that the auditor should use the complete assessment figures for 1974 in determining the maximum amount of bonded indebtedness.

CONCLUSION

It is the opinion of this office that the maximum amount of bonded indebtedness in 1975 is to be determined by the 1974 assessed valuation of tangible personal property although Senate Bill 333, 77th General Assembly, Second Regular Session, excludes household goods from taxation beginning January 1975.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

May 7, 1975

OPINION LETTER NO. 64

Dr. Jack Cross
Commissioner of Higher Education
Department of Higher Education
600 Clark Avenue
Jefferson City, Missouri 65101

Dear Dr. Cross:

This letter is in response to your request for an opinion as to the effect of House Bill 1643, 77th General Assembly, Second Regular Session, which amended Section 182.140, RSMo 1969. You state:

"We are informed that there are certain cities in the State which do not have an annual city election and that they instead have city elections only every two years. We are also informed that there are occasions when a special election is being held in the city for one purpose or another. My question is, if a city does not have an election every year, on what occasion may a library proposition be voted on; and if a city is holding a special election for some other purpose, may a library proposition be voted on at such a special election?"

Section 182.140(1), RSMo, as amended by House Bill 1643 of the 77th General Assembly, now reads:

"Whenever qualified electors equal to five percent of the total vote cast for governor at the last election in any city now or

Dr. Jack Cross

hereafter containing more than five thousand and less than six hundred thousand inhabitants petition the mayor, common council or other proper governing body in writing asking that an annual tax be levied for the establishment and maintenance of a free public library in the city, and specify in their petition a rate of taxation of not more than 25 cents for each one hundred dollars of assessed valuation on all the taxable property in the city, the governing body shall direct the proper officer to give notice in his next legal notice of the annual city election.

The officer shall furnish ballots, poll books and other necessary election items, and the expense of the election shall be paid out of the city treasury in the same manner with like effect and by the same officers as in the case of other city elections. The order of the governing body and the notice shall specify the name of the city and the rate of taxation mentioned in the petition, and the officer shall make and file in his office, return of service of the notice. Every voter within the city may vote

'For a tax for each one hundred dollars assessed valuation for a public library', or

'Against a tax for each one hundred dollars assessed valuation for a public library'.

If, from returns of the election, the majority of all the votes cast on the proposition at the election is 'for a tax for each one hundred dollars assessed valuation for a free public library', the governing body shall enter of record a brief recital of returns and that there has been established a public library and thereafter the free public library shall be established, and shall be a body corporate, and known as such." (Emphasis added).

Dr. Jack Cross

House Bill 1643 amended Section 182.140 by deleting the words "or special election, which may be called for the purpose of voting on the question" after the words "annual city election".

We have not been able to find any requirements in the statutes for annual city elections. Nor, have we been able to find any definition of "annual city elections". Section 73.430, RSMo 1969, relating to first class cities provides for a general election for the election of its officials on the first Tuesday after the first Monday in April every four years. Section 75.040, RSMo 1969, relating to second class cities, provides for a general election for its officials on the first Tuesday in April in even numbered years. Section 77.040 and Section 79.030, RSMo 1969, relating to third and fourth class cities respectively, provide for a general election for its officials on the first Tuesday of April every two years.

In answering your question, we apply the well accepted maxims of statutory construction. The primary rule is to determine and to give effect to the legislative intent. State ex rel. Lee American Freight System, Inc. v. Public Service Commission, 411 S.W.2d 190 (Mo. 1966). It is presumed that the legislature never intends to enact an absurd law incapable of being enforced. City of Joplin v. Joplin Water Works Company, 386 S.W.2d 369 (Mo. 1965). The law favors the construction of a statute which harmonizes with reason and which tends to avoid absurd or unreasonable results. In re Jackson, 268 F.Supp. 435 (E.D.Mo. 1967); City of Joplin v. Joplin Water Works Company, supra. In construing the statute repealing one statute and substituting another, the court must assume that the General Assembly intended something by the repeal of the old and the enactment of the new in lieu thereof. Darrah v. Foster, 355 S.W.2d 24 (Mo. 1962).

Possibly, Section 182.140, as amended by House Bill 1643, could be construed because of the choice of the words "annual city election" to mean that a proposition to create a city library could not be placed on any ballot and could not be voted on by the people. But, such a construction, in our opinion, would be unreasonable and would be contrary to the legislative intent. It seems clear to this office that by deleting the words "or special election which may be called for the purpose of voting on the question" the legislature only intended to take away the power of a city to hold a special election solely on the issue of creating a city library and establishing the necessary tax rate. Consequently, we are of the opinion that a Missouri court if faced with this issue would construe Section 182.140, as amended by House Bill 1643, to mean the regular election held

Dr. Jack Cross

by a city to elect its officials. In the case of second, third and fourth class cities, this would be on the first Tuesday of April every two years. We do not believe that the words "annual city elections" can be construed to include a special election which is being held by the city for some other purpose.¹

Very truly yours,-

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the typed name.

JOHN C. DANFORTH
Attorney General

¹There is presently pending in the General Assembly Senate Bill 318 which, if passed, would clear up the problem and remove any ambiguity since it specifically designates the elections at which this type of proposition can be considered. We have been advised that Senate Bill 318 has been reported out of committee with an amendment and with a recommendation of "do pass".



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

March 24, 1975

OPINION LETTER NO. 69

Mr. Michael D. Garrett, Director
Department of Public Safety
Post Office Box 749
Jefferson City, Missouri 65101

Dear Mr. Garrett:

This letter is in response to your recent request for an opinion from this office on whether an assessment levied by a fourth class city against property owned by the state for the paving of the street adjoining such property is a valid assessment and should be paid. You stated in your request that the city of Dexter is a fourth class city and has issued a special tax assessment for street paving against the state of Missouri. This tax assessment has been assigned to Delta Asphalt, Inc., which has made demand for payment in the amount of \$437.50. The assessment is against property owned by the state of Missouri and used by the 1221st Transportation Company Missouri National Guard.

A similar question was once presented to this office involving a third class city. In Opinion No. 35 issued on August 24, 1950, to Mr. R. L. Groves (copy enclosed), this office held that unless the General Assembly, by express enactment or clear implication, has included property owned by the state as being subject to local assessment it is exempt therefrom. As authority for this proposition, this office relied upon Normandy Consol. School Dist. of St. Louis County v. Wellston Sewer Dist. of St. Louis County, 77 S.W.2d 477 (St.L.Ct.App. 1934), and City of Clinton to Use of Thornton v. Henry County, 22 S.W. 494 (Mo. 1893). These cases have not been overruled by any Missouri court; and, consequently, we consider them to still be the law in this state. It was our conclusion that third class cities did not have the authority to levy an assessment against state-owned property since such property was not within the contemplation of Section 6987 (now Section 88.510, RSMo 1969).

Section 88.703 relating to the power of fourth class cities to make special assessments for street improvement provides as follows in pertinent part:

Mr. Michael D. Garrett

". . . and each lot or piece of ground abutting on such sidewalk, street, avenue, or alley, or part thereof, shall be liable for its part of the cost of any work or improvement provided for in sections 88.700 and 88.703, done or made along or in front of such lot or piece of ground as reported to the board of aldermen, and all lands, lots and public parks owned by any county or city, and all other public lands, all cemeteries, owned by public, private or municipal corporations; provided, that nothing in this section shall be construed to authorize any assessment against any cemetery lot, and all railroad rights-of-way fronting or abutting on any of said improvements shall be liable for their proportionate part of the cost of such work and improvements, and tax bills shall be issued against said property as against other property, and any county or city that shall own any such property shall out of the general revenue funds pay any such tax bill, and in any case where any county or city or railroad company shall fail to pay any such tax bill, the owner of the same may sue such county, city or railroad company on such tax bill and be entitled to recover a general judgment against such county, city or railroad company. . . ."

(Emphasis added)

We fail to see where state property is, by express enactment or clear implication, included in land being subject to the assessment. In our opinion, the use of the words "all other public lands" refers to public lands owned by public, private, or municipal corporations, and we do not believe that this includes land owned by the state. In Thogmartin v. Nevada School Dist., 176 S.W. 473 (K.C. Mo.App. 1915), the court held that the phrase "all other public lands" in a provision relating to the power of third class cities to make special assessments did not include land owned by a school district. Furthermore, the section specifically requires counties and cities to pay such assessments out of their general revenue and makes them liable for suit if they do not. There is no such language for property owned by the state. We believe that had the legislature intended to make state-owned property liable for special assessment it would have done so by specific language.

Because state-owned property is neither by express enactment nor clear implication subject to such special assessment as provided

Mr. Michael D. Garrett

for, it is our conclusion that this assessment issued by the city of Dexter is invalid and should not be paid.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 35
10-23-50, Groves

SEWERS:
SEWER DISTRICTS:
COOPERATIVE AGREEMENTS:
COUNTY COURT:
SEWER SUBDISTRICTS:

A county court may create a sewer subdistrict pursuant to Sections 204.331 and 204.332, RSMo Supp. 1973, and such subdistrict shall have, in addition to those powers specified

in Section 204.331, the powers given to sewer districts under Sections 249.430 to 249.660, RSMo 1969. However, in the creation of such a sewer subdistrict under Section 204.331, et seq., the county court must comply with the provisions of Sections 249.470 and 249.480, RSMo 1969. If such a sewer subdistrict is created, the county court, as governing body of the sewer subdistrict, may enter into a contract with a common sewer district created pursuant to Section 204.250, RSMo Supp. 1973, and Sections 204.260 to 204.470, RSMo 1969, whereby the common sewer district would provide any engineering, construction, maintenance, repair and administrative services required for the collection and treatment of sewage generated within the subdistrict.

OPINION NO. 70

April 3, 1975

Honorable James F. McHenry
Cole County Prosecuting Attorney
Room 400 - Courthouse
Jefferson City, Missouri 65101



Dear Mr. McHenry:

This is in response to an opinion request made by you, asking three questions. Your first question asks:

"May a county court create a sewer subdistrict pursuant to Section 204.331, et seq., RSMo Supp. 1973, having the powers given to sewer districts under Sections 249.430 to 249.660, RSMo 1969?

Sections 204.331 and 204.332, RSMo Supp. 1973, to which you refer, provide:

"204.331 . . . The county court or county legislature, may in addition to all powers herein granted or implied, create a subdistrict or subdistricts within the county, which subdistrict, when created, shall be a body corporate and politic. Creation of the subdistrict or subdistricts shall

Honorable James F. McHenry

be in the manner hereinafter provided, but in all other respects the administration and operation of the subdistricts shall be in the manner provided by sections 249.430 to 249.660, RSMo. Each subdistrict or subdistricts so created shall, in addition to the powers granted by sections 249.430 to 249.600, RSMo have the power and ability to contract with the trunk district herein created for the collection, transportation and treatment of sewage or any function associated therewith."

"204.332 . . . In lieu of the method of incorporation provided in sections 249.450 and 249.460, RSMo, subdistricts may be created in the following manner: Upon written recommendation of the county highway engineer, county sewer engineer, or director of public works; or upon petition of twenty percent of those persons residing within the area and owning property therein which will be liable to assessment for the construction and maintenance of a sewer system, setting forth generally the area to be included, the county court or county legislature shall adopt a resolution to establish the subdistrict and describing generally the size and location of the proposed subdistrict. The county court or county legislature may designate the highway engineer or director of public works as sewer engineer, or may retain the services of an engineer or firm of engineers as sewer engineers. The sewer engineer shall advise the county court with reference to proper boundaries of any subdistricts to be established and shall also superintend the construction of sewers and the maintenance thereof and the apportionment of the cost thereof as provided by law. The county court or county legislature shall also request the county clerk or other appropriate officer to appoint or designate a deputy to keep the special records which are required for the proceedings for the construction and maintenance of the sewer subdistricts or divisions."

We note that Section 204.331 expressly provides that the creation of a subdistrict should be in the manner provided in the following section, but in all other respects the administration and operation of the subdistrict shall be in the manner provided in Sections 249.430 to 249.660. This same section also provides that each subdistrict shall have certain powers, "in addition to the powers granted by Sections 249.430 to 249.660, RSMo. . . ."

Honorable James F. McHenry

In answer to your first question, we interpret the quoted portions of Section 204.331 to provide that a county court may create a sewer subdistrict pursuant to Section 204.331, et seq., and that such sewer subdistrict shall have, in addition to those powers specified in Section 204.331, the powers given to sewer districts under Sections 249.430 to 249.660, RSMo 1969.

Your second question asks:

"If the answer to question 1 is yes, in the creation of such sewer subdistrict, must the county court comply with the provisions of Sections 249.470 and 249.480, RSMo 1969?"

Section 204.332, set out above, provides in part:

"In lieu of the method of incorporation provided in sections 249.450 and 249.460, RSMo, subdistricts may be created in the following manner"

Section 204.332 then sets out the manner in which a sewer subdistrict is created, including who may recommend or petition for its creation, the contents of the recommendation or petition, the resolution process for formal creation of the subdistrict, and the designation of a sewer engineer to superintend planning, construction and maintenance of sewers.

Sections 249.450 and 249.460 provide:

"249.450 . . . 1. In any county having not less than five hundred thousand and not more than seven hundred thousand inhabitants and in any county which adjoins or which contains a portion of a city having more than four hundred thousand inhabitants whenever a petition signed by a majority of the owners resident in a part of such unincorporated residence district is filed with the county clerk of any such county, or whenever such county courts shall deem the construction of sewers necessary for sanitary or other purposes, such county court after consultation with the sewer engineer shall adopt a resolution to establish such sewer district or districts and describing generally the size and location of the proposed sewer district or districts.

"2. In any county of classes two, three or

Honorable James F. McHenry

four which are not subject to subsection 1, the county court of the county, upon the filing of a petition signed by a majority of the owners of a real estate in the proposed district, shall, after consultation with the sewer engineer, adopt a resolution to establish the sewer district and describing generally the size and location of the proposed sewer district."

"249.460 . . . Whenever the county court deems it necessary to provide for the construction of sewers as provided for in sections 249.430 to 249.660, it shall designate the county highway engineer as sewer engineer. The sewer engineer shall advise the county court with reference to proper boundaries of any sewer districts to be established and shall also superintend the construction of said sewers and the maintenance thereof and the apportionment of the cost thereof as provided by law. The county court shall also request the county clerk to appoint or designate a deputy county clerk to keep the special records which will, or shall be required for the proceedings for the construction and maintenance of sewer districts or divisions."

We note that Sections 249.450 and 249.460 parallel Section 204.332 in many respects. Section 249.450 sets out the methods whereby the creation of a sewer district is initiated (by petition, or on the motion of the county court in counties falling within subsection 1). Section 249.460 provides for the designation of a sewer engineer, provides that the sewer engineer shall advise the county court as to the boundaries of the sewer district and shall superintend construction, maintenance and apportionment of cost, and provides for the appointment of clerical help for the district via the county clerk.

We read Section 204.332 to cover the same matters as are covered in Sections 249.450 and 249.460. In addition, we note that both Section 249.450 and Section 204.332 contain language providing that the county court "shall adopt a resolution to establish the district [subdistrict] and describing generally the size and location of the proposed district [subdistrict]." Because of the basic similarity of language and content between Sections 249.450 to 249.460 and 204.332, we believe that the legislature intended that the latter section could be used as a substitute for the former two sections.

Section 204.332 makes no mention of Sections 249.470 and 249.480. Yet these two sections also set out certain provisions and conditions

Honorable James F. McHenry

for the creation of sewer districts. Section 249.470 provides:

"The county court, after receiving the recommendations of the sewer engineer, may by resolution, establish the boundaries of the sewer district or districts including therein only such lots, tracts and parcels of ground which may be conveniently served by a sewer. The action of the county court in determining the boundaries of said sewer districts shall be conclusive, provided, that no ground shall be included in the sewer district not contained in the natural drainage area or watercourse, or may be conveniently served through said sewer."

We note that this section makes provision for the establishment of definite boundaries for a sewer district, and further provides that such boundaries may be established only after the county court receives the recommendations of the sewer engineer. Yet Section 204.332 does not make, nor does any other section in Chapter 204 make provision for the setting of definite and certain boundaries for a sewer subdistrict.

Section 249.480 provides:

"1. The county court shall set a day for hearing anyone who might be interested with regard to said proposed work and shall publish said resolution with a notice of the time and place of hearing in some local newspaper of general circulation, published in the county, and if possible in the district affected by the resolution, and designated by the county court, at least two weeks before the date of the hearing, and by posting a copy of said resolution in five public places in said proposed sewer district or districts. At such hearing anyone interested in the proposed construction or operation of sewers may appear and present his views to the county court.

"2. Unless a majority of the owners of land within said sewer districts shall file a protest in writing with the county clerk on or before the day set for a hearing, the county court may proceed with the construction of the sewers. If such a majority protest is filed the county court shall have no authority to proceed with said work unless the state board of health or its authorized repre-

Honorable James F. McHenry

sentative files with the county clerk of the said county a written recommendation that such sewer is necessary for sanitary or other purposes, in which case the county court shall have the right to proceed as if no protest had been filed. The determination of the county court as to the sufficiency of any protest shall be conclusive unless said determination is attacked by a proceeding in the circuit court within ten days after such determination. After the expiration of six months after the filing of any such protest a new resolution may be adopted if deemed necessary by the county court."

We note that this section, most importantly, provides for a public hearing and an opportunity for a majority of the landowners in a sewer district to protest the construction of sewers, before such construction is undertaken by the county court. However, we note that Sections 204.331 and 204.332 make no provision for, or mention of, a public hearing or opportunity for a majority of the residents or landowners in a sewer subdistrict to voice their opposition to the proposed construction of sewers. This factor becomes particularly important when we consider that Section 204.332 changed the petition requirements from a majority of the owners of real property within a proposed district to twenty percent of the resident landowners in a proposed subdistrict.

It is apparent that Sections 249.450 and 249.460 do not provide a complete method of incorporating sewer subdistricts, because an inherent part of the incorporation process is found in other sections, that is, Sections 249.470 and 249.480. In view of the fact that Section 204.332 provides only an alternative procedure for the procedures found in Sections 249.450 and 249.460, we believe that the requirements of Sections 249.470 and 249.480 must be complied with before a sewer subdistrict can be incorporated under the provisions of Sections 204.331 and 204.332.

Your third question asks:

"If such a sewer subdistrict is created, may the county court enter into a contract with a common sewer district formed pursuant to Section 204.250, RSMo Supp. 1973 and Sections 204.260, et seq., RSMo 1969, whereby such common sewer district would provide engineering, construction, maintenance, repairs and administrative services in connection with the operation of the sewer subdistrict?"

Section 204.331 authorizes contracts between sewer subdistricts and common sewer districts. It provides:

Honorable James F. McHenry

" . . . Each subdistrict or subdistricts so created shall, in addition to the powers granted by sections 249.430 to 249.660, RSMo, have the power and ability to contract with the trunk district herein created for the collection, transportation and treatment of sewage for the collection, transportation and treatment of sewage or any function associated therewith."

We read the words "collection . . . of sewage or any function associated therewith" to refer to the entire process of sewage collection, from the home or business to the trunk lines, including operation and maintenance of the individual collection lines and incidental functions associated therewith. We believe such incidental functions would reasonably include the collection of service charges and the provision of administrative personnel and services to collect such charges.

Our interpretation of the language found in Section 204.331 is compelled by the use of the words "collection sewers" in the statutes relating to common sewer districts. In Section 204.330.2, after providing that the Board of Trustees of the common sewer district may enter into agreements with municipalities, subdistricts and private districts with regard to the regulation of the discharge of sewage from the sewer system of such entity, the legislature provided:

" . . . Each municipality, or subdistrict or private district shall control the discharge of wastes into its collection sewers to the extent necessary to comply with the agreement. . . ."
[Emphasis added.]

Additionally, reference is made in Section 204.310 to municipalities, subdistricts and private districts which operate a "sewage collection system which will discharge sewage into the trunk sewers or sewage facilities of the common sewer district." [Emphasis added.]

We interpret the term "collection sewers", as used in these statutes, to mean all of the system of sewer mains and laterals tributary to the trunk sewers. Therefore, we believe the reference to "collection . . . of sewage or any function associated therewith", as used in Section 204.331, to be intended by the legislature to include all those facilities, functions and services normally associated with the movement of sewage from the source thereof to the trunk line leading to the treatment plant.

In answer to your third question, we interpret Section 204.331 to empower a sewer subdistrict created pursuant to that Section to enter into a contract with a common sewer district created pursuant to Section 204.250, et seq., whereby the common sewer district would provide any

Honorable James F. McHenry

engineering, construction, maintenance, repair and administrative services required for the collection and treatment of sewage generated within the subdistrict.

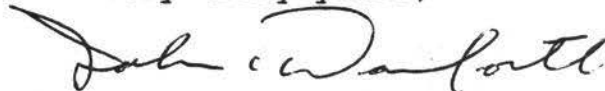
We note that your question asks whether the county court may enter into a contract with a common sewer district, whereas Section 204.331 empowers the sewer subdistrict to contract with a common sewer district. This same section provides that the sewer subdistrict, once created, is a body corporate and politic. Therefore, the subdistrict exercises its functions and powers in its own name, through the action of its duly authorized governing body. However, no governing body is provided in Sections 204.331 and 204.332 for sewer subdistricts. Instead, Section 204.331 provides that "the administration and operation of the subdistricts shall be in the manner provided by sections 249.430 to 249.660, RSMo." The language of Sections 249.430 to 249.660 leaves no doubt that the county court is to act as the governing body of sewer districts (in this case, subdistricts). Therefore, in entering into any contract, the county court, as governing body of the sewer subdistrict, would authorize the contract in the name of the subdistrict.

CONCLUSION

It is the opinion of this office that a county court may create a sewer subdistrict pursuant to Sections 204.331 and 204.332, RSMo Supp. 1973, and such subdistrict shall have, in addition to those powers specified in Section 204.331, the powers given to sewer districts under Sections 249.430 to 249.660, RSMo 1969. However, in the creation of such a sewer subdistrict under Section 204.331, et seq., the county court must comply with the provisions of Sections 249.470 and 249.480, RSMo 1969. If such a sewer subdistrict is created, the county court, as governing body of the sewer subdistrict, may enter into a contract with a common sewer district created pursuant to Section 204.250, RSMo Supp. 1973, and Sections 204.260 to 204.470, RSMo 1969, whereby the common sewer district would provide any engineering, construction, maintenance, repair and administrative services required for the collection and treatment of sewage generated within the subdistrict.

The foregoing opinion, which I do hereby approve, was prepared by my assistant, Dan Summers.

Very truly yours,



JOHN C. DANFORTH
Attorney General

February 4, 1975

OPINION LETTER NO. 71
Answer by letter-Mansur

Honorable Fred Williams
Representative, District 78
& House Post Office
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Williams:

This is in response to your request for an opinion from this office as follows:

"I question the legality of the mayor of the city of St. Louis using a civil service employee to act as a lobbyist for the city of St. Louis to lobby before the 78th General Assembly."

The first question to be considered is whether it is legal for the City of St. Louis to use public funds for the purpose of supporting or opposing legislative proposals before the state legislature on matters affecting the interest of the City of St. Louis. We are enclosing herewith Opinion No. 167 issued July 10, 1969, to Honorable Robert H. Branom, in which it is stated that public funds of a school district could be used to employ and compensate a person to take part in support or in opposition to legislation of matters pending before the legislature affecting the interest of the school district.

In answer to your question whether it is legal for the mayor of St. Louis City to use a civil service employee to act as a lobbyist before the General Assembly, we find no statute prohibiting such activities.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

February 27, 1975

OPINION LETTER NO. 72

Mr. Edward A. Godar, Director
Division of Personnel
Office of Administration
Post Office Box 388
Jefferson City, Missouri 65101

Dear Mr. Godar:

This letter is in response to your question asking:

- "1. Is that part of Section 42.060 RSMo which requires that 'assistants' to the Director of the Division of Veterans' Affairs be honorably discharged veterans still in effect, or does the Merit System Law take precedence now that these assistants must be employed subject to Chapter 36 RSMo?
- "2. If the 'assistants' must still be honorably discharged veterans, who makes the determination as to which employees fall in this category, the Director of the Division of Veterans' Affairs or the Personnel Director and Personnel Advisory Board who are responsible for establishing classifications and qualifications for positions subject to Chapter 36 RSMo?"

You also state that:

- "1. Under the Reorganization Act of 1974, the Division of Veterans' Affairs was placed in the Department of Social Services and its employees covered by the provisions of Chapter 36 RSMo.

Mr. Edward A. Godar

- "2. Chapter 36 RSMo provides for the Personnel Director and the Personnel Advisory Board to establish a classification plan, including qualifications for each class, for positions under the Merit System.
- "3. Chapter 36 RSMo provides for an examination process, including a system of preference points to be added to the test scores of veterans, the certification of top ranking five available eligibles, and the appointment of one of these eligibles. The preference point system for veterans is based on Article IV Section 19 of the Missouri Constitution.
- "4. The Personnel Division is now in the process of establishing job classes and qualification requirements for employees of the Division of Veterans' Affairs. Subsequently examinations will be given to establish registers from which new employees must be employed."

Section 13 of the Omnibus Reorganization Act, subsection 8, transferred all the powers, duties, and functions of the Division of Veterans Affairs, Chapter 42, RSMo, and others by type I transfer to the Division of Veterans Affairs which was created in the Department of Social Services. Such subsection also provides that the Director of the Division of Veterans Affairs be appointed by the department director.

Subsection 1 of Section 13 provides that the employees of the Department of Social Services be covered by the provisions of Chapter 36, RSMo, relating to the state merit system, with certain exceptions. We assume in answering your question that the positions are not excepted positions.

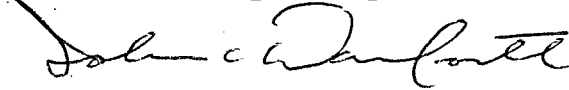
Section 42.060, RSMo, as you note, requires that all "assistants" to the Director of the Division of Veterans Affairs be honorably discharged veterans of the military forces of the United States.

Mr. Edward A. Godar

It is also our understanding that the term "assistants" has been administratively interpreted to mean "veterans service officers" and that the probable legislative intent in enacting Section 42.060 was that there should be a common bond between the veterans service officers and the veterans receiving the services.

It is, therefore, our view that the term "assistants" means the "veterans service officers" and that the legislature in placing such officers under the state merit system did not intend to remove the requirement that they be "honorably discharged veterans of the military forces of the United States."

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

January 29, 1975

JOHN C. DANFORTH
ATTORNEY GENERAL

OPINION LETTER NO. 73

Mr. William J. Raftery, Director
Division of Accounting
Office of Administration
Room 121, Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Raftery:

This letter is in response to your question asking:

"If a judge retires from service under the disability retirement provision, must the judge continue his contribution of 5% of salary to maintain his eligibility for regular retirement under the retirement provisions of 476.515 to 476.570 RSMo 1973 Supplement."

You also state that:

"Judge John C. Casey, retired judge of the 22nd Judicial Circuit, receives 50% of his past salary as disability retirement benefits. To protect his rights and possibly his wife's rights to receive regular retirement following the end of his originally-appointed term at December 31, 1976, Judge Casey has continued payment of 5% of his disability retirement benefits for retirement purposes. He has asked us to determine if he needs to continue paying the 5% of his disability retirement benefits to remain eligible for regular retirement benefits."

Sections 476.515 to 476.570, RSMo Supp. 1973, relate to the retirement of judges. Judges are defined in Section 476.515(4) as:

Mr. William J. Raftery

". . . any person who has served or is serving as a judge or commissioner of the supreme court or of the court of appeals, or as a judge of any circuit court, probate court, magistrate court, court of common pleas or court of criminal corrections of this state or as a justice of the peace;"

Salary is defined in Section 476.515(5) as:

". . . the total compensation paid for personal services as a judge by the state or any of its political subdivision."

Section 27, Article V, Constitution of Missouri, provides in part that:

". . . Where a judge or magistrate, subject to retirement under other provisions of law, has been retired under the provision of this section [Section 27], the time during which he was retired for disability under this section shall count as time served for purposes of retirement under other provisions of law."

However, a judge who has been retired under Section 27 is no longer a judge of any court. State on inf. Dalton v. Russell, 281 S.W.2d 781 (Mo.Banc 1955).

Although the definition of "judge" in Section 476.515 is broad enough to include a judge retired under Section 27 and although the time during which an eligible judge is retired under Section 27 expressly counts as time served in computing retirement benefits under Sections 476.515 et seq., it is our view that a judge receiving retirement benefits under Section 27 is not receiving a "salary" as defined in Section 476.515 and therefore is not required to make the contribution required under Section 476.525.

Therefore, the retirement contribution should not be collected from judges retired under Section 27.

Yours very truly,



JOHN C. DANFORTH
Attorney General

October 30, 1975

FILED

73

Mr. J. Neil Neilsen, Commissioner
Office of Administration
State of Missouri
Jefferson City, MO. 65101

Opinion No. T-73
Re: Abstract of Title covering
portions of Inlots 565, 566,
567 and 568 in the City of
Jefferson, State of Missouri

Dear Mr. Neilsen:

Pursuant to your request of September 25, 1975, I have examined the eleven Abstracts of Title covering the following described real estate located in Jefferson City, Missouri:

All of Inlot 565 with the exception of a tract described as follows: Beginning at the southwesterly corner of said Inlot 565, thence northerly on the west line of said inlot a distance of 81 feet 10 1/2 inches for the point of beginning, thence northerly along said west line 36 feet 10 1/2 inches, thence easterly on a line parallel with McCarty Street 64 feet 4 1/2 inches, thence southerly on a line parallel with Mulberry Street 36 feet 10 1/2 inches, thence westerly on a line parallel with McCarty Street 64 feet 4 1/2 inches to the point of beginning;

Also all of Inlot 566 except a tract out of the southeast corner thereof, said tract being 86 feet in a northwest-southeast direction by 39 feet and 4 inches in a southwest-northeast direction;

Also all of the west one-half of Inlot No. 567 with the exception of a tract out of the southwest portion thereof, said tract being described as follows: Beginning at the southwest corner of said Inlot No. 567, thence easterly along the south line of said lot 13 feet 7 1/2 inches, thence northerly on a line parallel with the west line of said inlot 86 feet, thence westerly on a line parallel with McCarty Street 13 feet 7 1/2 inches, thence southerly along the west line of said inlot 86 feet to the point of beginning;

Mr. J. Neil Neilsen
Page Two

All of the east one-half of Inlot No. 567 with the exception of a tract in the southeasterly part of said inlot described as follows: Beginning at the southeasterly corner of said inlot, thence northerly along the eastern boundary of said inlot 96 feet 6 inches, thence westerly on a line parallel with McCarty Street 42 feet 2 1/4 inches, thence southerly on a line parallel with the easterly boundary of said inlot 96 feet 6 inches, thence easterly along the south boundary of said inlot 42 feet 2 1/2 inches to the point of beginning;

All of Inlot No. 568 with the exception of the south 96 feet and 6 inches thereof.

These abstracts were last certified on either September 2 or September 3, 1975, and were prepared by the Cole County Abstract, Realty and Insurance Company of Jefferson City, Missouri.

Based upon my examination of these eleven abstracts, certified as stated above, I find a marketable title to said real estate to be in the Housing Authority of the City of Jefferson City, Missouri, subject to the following limitations, exceptions and requirements:

1. Subject to the rights and claims of any party or parties in possession of all or any part of the above described real estate other than the Housing Authority of the City of Jefferson City, Missouri.
2. Mechanic's and materialmen's liens, not of record, which may have become effective since September 3, 1975.
3. Subject to all existing streets and alleys.
4. Subject to any encroachments, easements, or measurements that a correct survey would show.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George H. Miller.

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

January 27, 1975

OPINION LETTER NO. 74

Mr. William J. Raftery
Director, Division of Accounting
Room 121, State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Raftery:

This is in response to your request for an opinion relating to the time for payment of a circuit court reporter. Specifically, you ask the following question:

"Is a newly elected circuit judge authorized to hire and order payment to a court reporter before the date at which the judge is authorized to assume the duties of his office?"

Section 478.010, RSMo 1969, states that circuit judges ". . . shall enter upon the duties of their office on the first Monday in January next following their election." Section 485.040 provides that circuit judges ". . . shall appoint an official court reporter for each court, or each division of the circuit court, who shall be well skilled in the art of shorthand reporting, . . ." Since a circuit judge does not enter upon his term until the first Monday in January following his election, it is clear that his power to appoint a court reporter does not officially begin until that date. Therefore, a court reporter cannot be appointed officially before the first Monday in January following the election of the circuit judge. Thus, the reporter's official capacity begins at the earliest when the circuit judge begins his duties.

A circuit court reporter ". . . shall receive an annual salary of twelve thousand dollars, payable in equal monthly

Mr. William J. Raftery

installments on the certification of the judge of the court or division in whose court the reporter is employed." Section 485.060.

We enclose Opinion Letter No. 93 rendered May 13, 1963, to Joe R. Ellis, which we believe sets out the principles of law here involved.

Thus, the pay period for the reporter begins at the time his appointment is valid, that is when the circuit court judge's term begins.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 93
5/13/63, Ellis



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

February 4, 1975

OPINION LETTER NO. 78

Honorable Theodore L. Johnson, III
County Counselor of Greene County
Greene County Courthouse
Springfield, Missouri 65802

Dear Mr. Johnson:

This letter is in response to your question asking:

"Does the County Court of a first class county have the authority to set budgetary levels for Magistrate Court personnel below the submitted request of the Magistrate Court for its annual operation?"

You also state that:

"The Greene County Magistrate Courts have submitted budgetary requests for 1975 in the sum of \$67,680. The County Court has considered fixing the budget level for 1975 at \$58,180. The Greene County Magistrate Court has made demand for \$67,680. Therefore must the County Court follow demand for requested level or can it fix the level."

You have also noted with respect to the circuit courts that Section 50.640, RSMo, limits the authority of the county court to change the estimates of the circuit court. We find no such limitation with respect to magistrate courts.


The Missouri Supreme Court opinions dealing with the interpretation of Section 50.640, RSMo, are not applicable here (see State ex rel. Judges, etc. v. City of St. Louis, 494 S.W.2d 39,

Honorable Theodore L. Johnson, III

(Mo. Banc 1973), and cases cited therein) except for the possible indication that irrespective of statute the Supreme Court would not likely permit the severe impairment of any judicial functions as a matter of constitutional law.

In these premises we cannot see a severe impairment of the court's functions by reason of the estimate reduction such as to give rise to a constitutional question. We therefore conclude that the county court has authority to reduce such budgets under the county budget law and particularly Section 50.610.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the typed name.

JOHN C. DANFORTH
Attorney General.

February 6, 1975

OPINION LETTER NO. 80
Answer by letter-Nowotny



Mr. Lawrence Graham, Director
Missouri Department of Social Services
Broadway State Office Building
Jefferson City, Missouri 65101

Dear Mr. Graham:

This is in answer to your request for an opinion in which you ask whether the Director of the Department of Social Services may, under the Omnibus Reorganization Act of 1974, C.C.S.H.C.S.S.C.S.S.B. No. 1, First Extraordinary Session, Seventy-Seventh General Assembly, create divisions and staff such divisions, and, if so, whether the exemptions to Chapter 36, RSMo, as stated in Section 13.1 of S.B. 1, apply to those divisions so created.

Attached is a copy of Opinion No. 37 dated February 5, 1975, to Mark Edelman, in which we stated that authority is given under Section 1.6(2) of S.B. 1 for the organization of departments into divisions, and therefore for the creation of divisions within the department. Therefore, it is our view that the Director of the Department of Social Services can create divisions and staff such divisions.

As to your question relating to the merit system law, Chapter 36, RSMo, we draw your attention to the remainder of the discussion in Opinion No. 37 holding that heads of such divisions are exempt from the merit system law pursuant to Section 36.030, H.B. No. 8, First Extraordinary Session, Seventy-Seventh General Assembly. The basis of the holding was that the pertinent language of Section 36.030 exempted

heads of divisions which are required by law to be appointed by the director of a department. Since Section 1.6(6) of S.B. No. 1 provides that all division heads, including those divisions created in departmental plans, are to be appointed by the director, our opinion thus held that such positions are exempt under Section 36.030.

Also enclosed is our Opinion No. 220, dated June 11, 1974, to the Honorable Christopher S. Bond, in which we held that the provisions of Section 13.1 of S.B. 1, exempt from the requirements of Chapter 36 the positions listed therein. The pertinent language in Section 13.1 provides as follows:

" . . . All employees of the department of social services shall be covered by the provisions of chapter 36, RSMo, except the director of the department and his secretary, all division directors and their secretaries, and no more than three additional positions in each division which may be designated by the division director."

The question then is whether the use of the term "division" in Section 13.1 encompasses divisions created by departmental plans as discussed in Opinion No. 37. It is our opinion that the reasoning of Opinion No. 37 is equally applicable here and that the intent of Section 13.1 is to provide exemptions for all divisions of the department, including divisions created by departmental plan.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Opinion No. 220
 6-11-74, Bond

 Opinion No. 37
 2-5-75, Edelman

OPINION LETTER NO. 84
Answer by letter-Klaffenbach



Mr. William J. Raftery, Director
Division of Accounting
Office of Administration
Room 121, Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Raftery:

This letter is in response to your question asking:

"Is the effective date of office of Division 2 of Judicial Circuit #20 January 1, 1975 as indicated in House Bill 964 passed in the Second Regular Session of the 77th General Assembly or January 6, 1975 as would be the effective date using Section 478.010 RSMO 1969 as a reference?"

House Bill No. 964 to which you refer provides:

"SECTION 1. 1. Beginning on January 1, 1975, the circuit court of the counties of Franklin, Gasconade and Osage, composing the twentieth judicial circuit, shall be composed of two judges. Each judge shall separately try causes, exercise the powers, and perform all duties imposed upon circuit judges. The divisions of the circuit court shall be 'Circuit Court Division Number One' and 'Circuit Court Division Number Two'.

"2. The judge of division two shall be elected at the general election in 1974 for a six-year term and candidates shall be nominated in the same manner as provided in Section 120.550, RSMo 1969, for that election

Mr. William J. Raftery

only and the judge of division one shall be elected at the general election in 1976 for a six-year term, and their successors shall be elected for six-year terms. The circuit judge of the twentieth judicial circuit on the effective date of this act shall not be affected by its provisions other than to become the judge of division one on January 1, 1975, and to serve as circuit judge of division one until his successor is duly elected and qualified.

"3. The method of assignment of cases and terms of court between the divisions shall be determined by court rule. When a judge is not occupied with other business of the court or his division, he shall, as far as practicable, aid the other judge."

Section 478.010, to which you refer, provides in pertinent part:

"1. Except as provided in section 29 of article V of the constitution of Missouri, the circuit judges of the various judicial circuits shall be elected at the general elections as herein provided and at the general election every six years thereafter, and shall enter upon the duties of their office on the first Monday in January next following their election."

The reference in the above section to Section 29, Article V, is not pertinent here.

The provisions of Section 478.010 respecting the six-year term for circuit judges is consistent with Section 23, Article V of the Constitution which provides for such terms.

Our review of the legislative history of House Bill No. 964 indicates that such bill, as introduced, provided in part that:

"The judge of division two shall be appointed prior to January 1, 1975, shall become circuit judge of division two on January 1, 1975, and shall serve as circuit judge of division two until his successor is duly elected and qualified, as provided in this section. The judge of division two shall be

Mr. William J. Raftery

elected at the general election in 1978
for a six-year term and . . ."

It is apparent that the difficulty in the language used in the bill as truly agreed to and finally passed came about because of the amendment in passage which now provides for the election of a judge at the general election in 1974 for a six-year term instead of for the election of a judge at the general election in 1978 for a six-year term.

We note that nothing in the truly agreed to and finally passed version of the bill provides that the elected judge will take office on January 1, 1975. The first section of the bill creates an additional office of circuit court judge on the first day of January, 1975.

It is true that previous enactments creating new circuit judge offices have referred to "the first Monday in January," and provided for the election of the new incumbents to take office on "the first Monday in January" following such election. See Sections 478.625 and 478.700, RSMo Supp. 1973. Both of these prior sections were, therefore, consistent with the provisions of Section 478.010 quoted above.

However, it is our view that, in the absence of clear provisions to the contrary, the bill must be read in conjunction with the provisions of Section 478.010. To construe such bill as authorizing the elected judge to take office on the first day of January contrary to the provisions of Section 478.010 would not be in harmony with the legislative intent because an unusual and absurd situation would exist in that the judge of the new division would, under such interpretation, take office with a term beginning and ending at times different than other similar offices or a term beginning at a different time but ending beyond the six years prescribed by the Missouri Constitution.

Since, as we have noted, there is no express provision in the bill that the judge take office January 1, it is our view that a vacancy existed in such office between the effective date of the creation of the office and January 6, the first Monday of 1975, which vacancy could have been filled by appointment. However, no such appointment was made. Thus, such judge's compensation commences January 6, 1975.

Finally, we note that any acts of the judge who was elected in November, 1974, between January 1 and January 6, 1975, were the acts of a de facto officer holding office under color of authority and as such were valid acts. State ex rel. Cosgrove v. Perkins, 40 S.W. 650, 652 (Mo. 1897).

Mr. William J. Raftery

Therefore, the judge elected to fill the office of the newly-created judge of Division Two of the Twentieth Judicial Circuit under House Bill No. 964, Second Regular Session, 77th General Assembly, began his term of office the first Monday in January, 1975, and his compensation commenced as of that date.

Yours very truly,

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

February 14, 1975

OPINION LETTER NO. 85

Honorable Nelson B. Tinnin
State Senator, District 25
% Senate Post Office, Capitol Building
Jefferson City, Missouri 65101

Dear Senator Tinnin:

This letter is in response to your question asking which assessed valuation figure is applicable to the determination of the maximum rate of levy which may be imposed under Section 178.870.

We understand the urgency of your request and, in the interest of time, we have made our response brief.

After examining the legal memoranda submitted with your request and having considered the legislative intent in enacting Section 178.870 and the statutes relative to such assessments, we conclude that the assessed valuation referred to in such section is the last completed and established valuation at the time the levy is determined. That is, the valuation of the taxable property in a junior college district for purposes of determining the maximum tax levy of such district for the year 1975 is the valuation of the district as determined by the State Tax Commission for the year 1974.

Very truly yours,

JOHN C. DANFORTH
Attorney General

February 10, 1975

OPINION LETTER NO. 87
Answer by letter-Klaffenbach

Honorable Ike Skelton
State Senator, District 28
% Senate Post Office
State Capitol Building
Jefferson City, Missouri 65101



Dear Senator Skelton:

This letter is in response to your question asking:

"Can a resident be reimbursed for damages to his property which were made by a patient of one of the state's mental institutions?"

You also state that:

"A patient of the Higginsville State School left the immediate custody and control of that institution. While away from the institution he caused a fire which destroyed a barn (and its contents) of a private citizen. . . ."

It is our view that such a payment would be in violation of the provisions of Article III, Section 38(a) of the Missouri Constitution which prohibits a grant of public money to private persons.

We have given our opinion previously on related questions in Opinion No. 471, 1966, and Opinion No. 63, 1966, copies of which are enclosed.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures

ASSESSMENTS: (1) The State Tax Commission has the
STATE AUDITOR: authority and is obligated to equal-
STATE TAX COMMISSION: ize the assessments of property among
the various counties and the City of
St. Louis pursuant to Section 138.390, RSMo, and has the duty to
order any county in which valuations of property are below 33 1/3%
of true value to raise the valuation of such property to 33 1/3% of
true value and to order any county in which valuations of property
are above 33 1/3% of true value to lower the valuation of such prop-
erty to 33 1/3% of true value. (2) The State Tax Commission has no
authority to equalize the assessments among various parcels of prop-
erty within a county as such, but individual assessments can be
raised or lowered pursuant to Sections 138.380, 138.460, and 138.
470, RSMo. (3) The State Auditor has no authority to compel the
State Tax Commission to require the equalization of assessments
among the various counties or the City of St. Louis at 33 1/3% of
true value.

OPINION NO. 88

February 28, 1975

Honorable George W. Lehr
State Auditor
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Lehr:

This opinion is in response to the following questions that
you have asked:

"1) What authority and obligation, if any,
does the State Tax Commission have to re-
quire that all property in the state is as-
sessed at 33 1/3% of true value?

"2) What authority and obligation, if any,
does the State Tax Commission have to re-
quire that assessments be equalized within
any county or the City of St. Louis?

"3) What authority and obligation, if any,
does the State Tax Commission have to re-
quire that assessments be equalized among
the various counties and the City of St.
Louis?

"4) What authority do I, as State Auditor,
have to compel the State Tax Commission to
perform any of the above obligations that
you may determine to exist?"

Honorable George W. Lehr

A review of the relevant provisions of law is necessary to answer your first three questions. Article X, Section 4(a) and (b) of the Missouri Constitution state as follows:

"Section 4(a). All taxable property shall be classified for tax purposes as follows: class 1, real property; class 2, tangible personal property; class 3, intangible personal property. The general assembly, by general law, may provide for further classification within classes 2 and 3, based solely on the nature and characteristics of the property, and not on the nature, residence or business of the owner, or the amount owned. Nothing in this section shall prevent the taxing of franchises, privileges or incomes, or the levying of excise or motor vehicle license taxes, or any other taxes of the same or different types.

"Section 4(b). Property in classes 1 and 2 and subclasses of class 2, shall be assessed for tax purposes at its value or such percentage of its value as may be fixed by law for each class and for each subclass of class 2. Property in class 3 and its subclasses shall be taxed only to the extent authorized and at the rate fixed by law for each class and subclass, and the tax shall be based on the annual yield and shall not exceed eight per cent thereof."

Section 137.115, RSMo, effective December 31, 1974, states as follows:

"1. All other laws to the contrary notwithstanding, the assessor or his deputies in all counties of this state including the city of St. Louis, shall between the first day of January and the first day of June, annually make a list of all real and tangible personal property taxable in his city, county, town or district and except as otherwise provided in subsections 2 and 3 hereof, shall assess the property at thirty-three and one-third percent of its true value in money in the following manner: He shall call

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at the office, place of doing business, or residence of each person required by this chapter to list property, and require the person to make a correct statement of all taxable real property in the county owned by the person, or under his care, charge or management, and all taxable tangible personal property owned by the person or under his care, charge or management, taxable in the county, except merchandise upon which he is required to pay a license tax.

"2. Assessors in each county of this state and the city of St. Louis may send personal property assessment forms through the mail.

"3. Agricultural field crops in an unmanufactured condition which are used or intended to be used solely as seed or in the feeding of livestock or poultry constitute a separate class of tangible personal property and shall be assessed and valued for the purpose of taxation at ten percent of their true value in money. This provision does not apply to the assessment of licenses and taxes on merchants or manufacturers, but the licenses and taxes shall continue to be assessed in the manner provided in sections 150.010 to 150.370, RSMo.

"4. The person listing the property shall enter a true and correct statement of the property, in a printed blank prepared for that purpose. The statement, after being filled out, shall be signed and either affirmed or sworn to as provided in section 137.155. The list shall then be delivered to the assessor."

The significant change in this latest amendment of Section 137.115, RSMo, over previous versions, is that it requires that property be assessed at ". . . thirty-three and one-third percent of its true value . . ." instead of "true value."

The general duties and powers of the State Tax Commission and its duties and powers relating specifically to the assessment of property are established in Sections 138.380 and 138.390, RSMo, as follows:

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"It shall be the duty of the state tax commission, and the commissioners shall have authority to perform all duties enumerated in this section and such other duties as may be provided by law:

(1) To raise or lower the assessed valuation of any real or tangible personal property, including the power to raise or lower the assessed valuation of the real or tangible personal property of any individual, copartnership, company, association or corporation; provided, that before any such assessment is so raised, notice of the intention of the commission to raise such assessed valuation and of the time and place at which a hearing thereon will be held, shall be given to such individual, copartnership, company, association or corporation as provided in sections 138.460 and 138.470;

(2) To require from any officer in this state, on forms prescribed by the commission, such annual or other reports as shall enable said commission to ascertain the assessed and equalized value of all real and tangible property listed for taxation, the amount of taxes assessed, collected and returned, and such other matter as the commission may require, to the end that it may have complete information concerning the entire subject of revenue and taxation and all matters and things incidental thereto;

(3) To cause to be placed upon the assessment rolls at any time during the year omitted property which may be discovered to have, for any reason, escaped assessment and taxation, and to correct any errors that may be found on the assessment rolls and to cause the proper entry to be made thereon;

(4) To investigate the tax laws of other states and countries, to formulate and submit to the legislature such recommendations as the commission may deem expedient to prevent evasions of the assessment and taxing laws, whether the tax is specific or general,

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to secure just, equal and uniform taxes, and improve the system of assessment and taxation in this state;

(5) To prescribe the form of all blanks and books that are used in the assessment and collection of the general property tax, except as otherwise provided by law."
(Section 138.380, RSMo)

"1. Between the dates of June twentieth and the second Monday in July, 1946, and between the same dates each year thereafter, the state tax commission shall equalize the valuation of real and tangible personal property among the several counties in the state in the following manner: With the abstracts of all the taxable property in the several counties of the state and the abstracts of the sales of real estate in such counties as returned by the respective county clerks and the assessor of the city of St. Louis, the commission shall classify all real estate situate in cities, towns, and villages, as town lots, and all other real estate as farming lands, and shall classify all tangible personal property as follows: Banking corporations, railroad corporations, street railroad corporations, all other corporations, horses, mares and geldings, mules, asses and jennets, neat cattle, sheep, swine, goats, domesticated small animals and all other livestock, poultry, power machinery, farm implements, other tangible personal property.

"2. The Commission shall equalize the valuation of each class thereof among the respective counties of the state in the following manner:

(1) It shall add to the valuation of each class of the property, real or tangible personal, of each county which it believes to be valued below its real value in money such per cent as will increase the same in each case to its true value;

(2) It shall deduct from the valuation of each class of the property, real or tangible

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personal, of each county which it believes to be valued above its real value in money such per cent as will reduce the same in each case to its true value."
(Section 138.390, RSMo)

Initially, it is our view that the latest amendment to Section 137.115, RSMo, has simply given different legislative guidance to the various entities at the state and local level charged with the responsibility for assessment of property. Where the provision previously required assessment of property at "true value," it now requires assessment at 33 1/3% of true value. We do not view this statutory amendment as altering the powers and duties of the State Tax Commission other than to establish a different assessment standard that the Commission should utilize in discharging its obligations.

In response to your second and third questions specifically, the law has clearly been that county boards of equalization have the exclusive duty and obligation to equalize intra-county assessments within their respective counties (and the City of St. Louis), and the State Tax Commission has the exclusive duty and obligation to equalize assessments among the various counties and the City of St. Louis.

In May Department Stores Company v. State Tax Commission, 308 S.W.2d 748 (Mo. 1958), the Missouri Supreme Court stated at p. 759:

"A County Board of Equalization has the full power and duty to effect intra-county equalization. § 138.050, § 138.100. It shall raise the valuation of all tracts as have, in its opinion, 'been returned below their real value.' The State Tax Commission has nothing to do with intra-county equalization. § 138.390; First Trust Co. of St. Joseph v. Wells, 324 Mo. 306, 23 S.W.2d 108. . . ."

Further definition of "intercounty equalization" and "intra-county equalization" and the respective powers of county boards of equalization and the State Tax Commission is found in Foster Bros. Mfg. Co. v. State Tax Commission of Missouri, 319 S.W.2d 590 (Mo. 1958) at p. 594:

"In addition to its duty to hear appeals of individual property owners from the action of local boards, the [State Tax] Commission has the duty to equalize the valuation of

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property as between the several counties (and City of St. Louis) of the State. That duty is called intercounty equalization. . . .

"As heretofore noted, the Board of Equalization of St. Louis has the power and duty to equalize the assessment valuations of real property within the city. Section 138.150. The performance of that duty is called intra-county equalization."

See also, First Trust Co. of St. Joseph v. Wells, 23 S.W.2d 108, 110-111 (Mo. 1929).

This office has previously held that the State Tax Commission discharges its duties relating to intercounty equalization by following the procedures established in Section 138.390, RSMo. Opinion No. 18 dated February 28, 1957, to Honorable Arthur B. Cohn (copy enclosed). At page 2 of the Cohn opinion we stated:

"Section 138.390 RSMo 1949, provides that between the dates of June 20th and the second Monday in July of each year, the State Tax Commission shall proceed to equalize the real and tangible personal property among the several counties in the state by adding to or deducting from the valuation of each class of property, such per cent as will tend to equalize the valuation of property throughout the state. Thus it is seen that the State Tax Commission is not, in performing their intercounty equalization function dealing with the valuation of individual pieces of property, but is dealing only in aggregate valuation of the several classes of property within the county. In other words, the State Tax Commission fixes and determines only the total valuation of the class of property within a county rather than the valuations of individual tracts. After such aggregate valuation is determined by the State Tax Commission, the secretary of said commission is required to transmit to the county clerk a report showing the per cent added to or deducted from the valuation of each class of property in the county, together with the aggregate value of the real and tangible personal property in

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the county, as fixed and determined by the commission. Such report is to be delivered to the county clerk so that it may be in the hands of the county board of equalization on or before the second Monday in July. See Section 138.140 RSMo 1949. The method of effecting a compliance with said order is left to the determination of the proper county officials."

An additional consideration relating to the State Tax Commission's powers to assess individual parcels of real property should be mentioned. As quoted previously, Section 138.380(1), RSMo, states:

"It shall be the duty of the state tax commission, and the commissioners shall have authority to perform all duties enumerated in this section and such other duties as may be provided by law:

(1) To raise or lower the assessed valuation of any real or tangible personal property, including the power to raise or lower the assessed valuation of the real or tangible personal property of any individual, copartnership, company, association or corporation; provided, that before any such assessment is so raised, notice of the intention of the commission to raise such assessed valuation and of the time and place at which a hearing thereon will be held, shall be given to such individual, copartnership, company, association or corporation as provided in sections 138.460 and 138.470;"

Section 138.460, RSMo, states:

"1. After the various assessment rolls required to be made by law shall have been passed upon by the several boards of equalization and prior to the making and delivery of the tax rolls to the proper officers for collection of the taxes, the several assessment rolls shall be subject to inspection by the commission, or by any member or duly authorized agent or representative thereof.

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"2. In case it shall appear to the commission after such investigation, or be made to appear to said commission by written complaint of any taxpayer, who has previously appealed to the local board of equalization, that property subject to taxation has been omitted from said roll, or individual assessments have not been made in compliance with law, the said commission may issue an order directing the assessing officer whose assessments are to be reviewed to appear with his assessment roll and the sworn statements of the person or persons whose property or whose assessments are to be considered, at a time and place to be stated in said order, said time to be not less than five days from the date of the issuance of said order, and the place to be at the office of the county court at the county seat, or at such other place in said county in which said roll was made as the commission shall deem most convenient for the hearing herein provided. All complaints shall be filed with the commission not later than September thirtieth.

"3. A copy of above order shall be published in at least one newspaper published in the county at least five days before the time at which said assessor is required to appear; or, where practicable, notice by mail may be given prior to said hearing to all persons whose assessments are to be considered. A copy of said order shall be served on the assessing officer at least three days before he is required to appear with said roll."

Section 138.470, RSMo, states:

"1. The commission, or any member thereof, or any duly authorized agent, shall appear at the time and place mentioned in said order, and the assessing officer, upon whom said notice shall have been served, shall also appear with said assessment roll. The commission, or any member thereof, or any duly authorized agent thereof, as the case may

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be, shall then and there hear and determine as to the proper assessment of all property and persons mentioned in said notice, and all persons affected, or liable to be affected by review of said assessments thus provided for, may appear and be heard at said hearing. In case said commission, or any member or agent thereof who is acting in said review, shall determine that the assessments so reviewed are not made according to law, the county clerk shall, in a column provided for that purpose, place opposite said property the lawful valuation of the same for assessment.

"2. As to the property not upon the assessment roll, the county clerk, upon order of the state tax commission, acting in said review, shall place the same upon said assessment roll by proper description and shall place thereafter in the proper column the value required by law for the assessment of said property. The county clerk, upon orders of the state tax commission, shall also spread upon said roll a certificate showing the day and date on which said assessment roll was reviewed by the commission.

"3. For appearing with said roll as required herein the assessing officer shall receive the same per diem as is received by him while in attendance at the meeting of the county board of equalization. His claim shall be presented to and paid by the proper officer of the political subdivision, or municipality, of which he is the assessing officer, in the manner as his other compensation is paid.

"4. The action of the commission, or member or agent thereof, when done as provided in this section, shall be final, subject, however, to the provisions of section 22, article V of the Constitution of Missouri and laws enacted thereunder.

"5. When any property has been reviewed, assessed and valued by the commission as

Honorable George W. Lehr

herein authorized, such property shall not be assessed or valued at a lower figure or a higher figure by the local assessing or equalizing officer for the year the assessment is made."

These sections of Chapter 138, RSMo, describe, in effect, two methods by which the State Tax Commission is authorized to review an assessment of an individual parcel and revise the assessment, if found warranted.

Section 138.460.1, RSMo, provides that the assessment rolls ". . . shall be subject to inspection by the commission, or by any member or duly authorized agent or representative thereof. . . ." after having ". . . been passed upon by the several boards of equalization and prior to the making and delivery of the tax rolls to the . . ." collectors.

Subsection 2 of Section 138.460, RSMo, provides that after investigation by the Commission, or upon complaint of any taxpayer, as provided, the State Tax Commission may order a hearing to consider the assessment, if the Commission believes that the assessment has not been made in compliance with the law. The Commission after review pursuant to Sections 138.460 and 138.470, RSMo, may revise the assessment. See Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 19 S.W.2d 746 (Mo.Banc 1929), cert.den. 280 U.S. 604, order revoked 280 U.S. 550, rev'd on other grounds 281 U.S. 673, conformed to 42 S.W.2d 23; where the Supreme Court of Missouri en banc stated at 19 S.W.2d 751:

"It is no doubt true that the state tax commission was not intended to supplant local assessing officers and boards, but very clearly it is given full and adequate power, not only to supervise, but to review, their work, and where it finds assessments which were not made conformably to law to revise them--and this by inserting where necessary, after a hearing, its own valuations in lieu of those made by the local authorities. . . ."

See also, Wiget v. City of St. Louis, 85 S.W.2d 1038 (Mo. 1935), where the Supreme Court of Missouri explained the Brinkerhoff-Faris case as follows at p. 1043:

". . . this case . . . held that the State Tax Commission was vested with full and adequate power, not only to supervise, but

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to review, the work of the local assessing officers and boards, and to revise assessments not made conformably to law. . . ."

Thus, it appears that the State Tax Commission has the authority, on its own initiative, to review all individual assessments within any and all counties and the City of St. Louis. If the Commission, pursuant to the above-quoted provisions, did review all assessments within a particular county or the City of St. Louis, and revised them accordingly, this could, in fact, constitute an "intra-county equalization." However, this authority, by the language used in the above-quoted provisions, is clearly discretionary with the Commission.

In addition, we note Section 138.410, RSMo, which states:

"1. The commission shall exercise general supervision over all the assessing officers of this state, over county boards of equalization and appeal in the performance of their duties under this chapter and all other laws concerning the general property tax and shall institute proper proceedings to enforce the penalties and liabilities provided by law for public officers, officers of corporations and individuals failing to comply with the provisions of this chapter, and of all laws relating to the general property tax.

"2. In the execution of these powers the said commission shall call upon the attorney general or any prosecuting or circuit attorney in the state, to assist this commission in the enforcement of laws with the supervision of which this commission is charged, and when so called upon it shall be the duty of the attorney general, and the prosecuting or circuit attorneys in their respective counties, to assist in the commencement and prosecution of actions and proceedings for penalties, forfeitures, removals and punishments for violation of the laws in respect to the assessment and taxation of property, and to represent the commission in any litigation which it may wish to institute or in which it may become involved in the discharge of its duties."

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We feel compelled, however, to observe that prosecuting attorneys and the Attorney General should be called upon to ". . . assist in the commencement and prosecutions of actions and proceedings for penalties, forfeitures, removals and punishments for violation . . ." in only the most extreme of circumstances. The nature of the duties of local assessors and county boards of equalization and the strict legal standard against which any contemplated action must be measured would make any such prosecution extremely difficult.

In light of the previous discussion, your last question concerns what authority, if any, you possess as State Auditor to compel the State Tax Commission to require the equalization of assessments among the various counties and the City of St. Louis at 33 1/3% of true value.

Article IV, Section 13 of the Missouri Constitution states:

"The state auditor shall have the same qualifications as the governor. He shall establish appropriate systems of accounting for all public officials of the state, post-audit the accounts of all state agencies and audit the treasury at least once annually. He shall make all other audits and investigations required by law, and shall make an annual report to the governor and general assembly. He shall establish appropriate systems of accounting for the political subdivisions of the state, supervise their budgeting systems, and audit their accounts as provided by law. No duty shall be imposed on him by law which is not related to the supervising and auditing of the receipt and expenditure of public funds."

The following provisions in Chapter 29 relating to the State Auditor are relevant to the State Auditor's authority to audit the State Tax Commission.

Section 29.200, RSMo, states:

"The state auditor shall post-audit the accounts of all state agencies and audit the treasury at least once annually. Once every two years, and when he deems it necessary, proper or expedient, the state auditor shall examine and post-audit the accounts of all

Honorable George W. Lehr

appointive officers of the state and of institutions supported in whole or in part by the state. He shall audit any executive department or agency of the state upon the request of the governor."

Clearly, the State Tax Commission is a state agency and the State Auditor is authorized to "post-audit the accounts" of the Commission.

Section 29.235.1, RSMo, states:

"1. All audits shall conform to recognized governmental auditing practices."

Section 29.180, RSMo, states:

"The state auditor in cooperation with the budget director shall establish appropriate systems of accounting for all officers and agencies of the state, including all educational and eleemosynary institutions, and he shall also prescribe systems of accounting for all county officers. Such systems of accounting shall conform to recognized principles of governmental accounting and shall be uniform in application to officers of the same grade and kind and to accounts of the same kind. Such systems of accounting shall be adequate to record all assets and revenues accrued, all liabilities and expenditures incurred, as well as all cash receipts and disbursements, and all transactions affecting the acquisition and disposition of property, including the preparation and keeping of inventories of all property. Each department shall keep such accounts in accordance with the system of accounts prescribed by the auditor."

We find nothing in the above-quoted provisions which would authorize you, as State Auditor, to compel the State Tax Commission to require the equalization of assessments among the various counties and the City of St. Louis at 33 1/3% of true value.

Furthermore, the Supreme Court of Missouri in State ex rel. St. Francois County School District R-III v. LaLumondier, No. 58,586 (Mo. February 10, 1975), held that a school district did

Honorable George W. Lehr

not have standing to challenge an assessment of private property within the district where there was no express statutory authorization for an appeal by said political subdivision. The court held that if the General Assembly had desired to provide an appeal right for others than the particular property owner it would have done so. The court stated at Slip Opinion pp. 8-9:

" . . . No doubt such [appeal right of governmental subdivision] was originally omitted on the theory that public officials would adequately protect the interests of the state and its subdivisions and hence it was only necessary to provide an appeal for property owners who considered the valuation of their property to be excessive. We recognize that relator has a vital interest in the assessment valuation of property located in its district. In the situation presented it may be that the legislature should review the matter and give consideration to an appropriate amendment of the section. Until appeal or other review procedure is provided, however, we must rule that school districts do not have standing to obtain a review of alleged underassessment of property by the county board."

We believe the reasoning applied in this case supports our view that, in the absence of express statutory authority, you, as State Auditor, lack authority to compel the State Tax Commission to require the equalization of assessments among the various counties and the City of St. Louis at 33 1/3% of true value.

CONCLUSION

It is the conclusion of this office that: (1) the State Tax Commission has the authority and is obligated to equalize the assessments of property among the various counties and the City of St. Louis pursuant to Section 138.390, RSMo, and has the duty to order any county in which valuations of property are below 33 1/3% of true value to raise the valuation of such property to 33 1/3% of true value and to order any county in which valuations of property are above 33 1/3% of true value to lower the valuation of such property to 33 1/3% of true value; (2) the State Tax Commission has no authority to equalize the assessments among various parcels of property within a county as such, but individual assessments can be raised or lowered pursuant to Sections 138.380,

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138.460, and 138.470, RSMo; (3) the State Auditor has no authority to compel the State Tax Commission to require the equalization of assessments among the various counties or the City of St. Louis at 33 1/3% of true value.

The foregoing opinion, which I hereby approve, was prepared by my assitant, Andrew Rothschild.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 18
2-28-57, Cohn

February 27, 1975

OPINION LETTER NO. 89
Answer by letter-Wieler

Mr. Paul W. Collins, Director
Division of Highway Safety
Department of Public Safety
2634 Industrial Drive
Jefferson City, Missouri 65101



Dear Mr. Collins:

This letter is in response to your request for an opinion as to whether or not Sections 58.445 to 58.449, RSMo Supp. 1973, would allow a coroner or a county medical examiner to release blood alcohol information compiled in accordance with these sections to anyone other than the Missouri Division of Highway Safety.

Such sections were enacted by the legislature in Senate Bill No. 41, 77th General Assembly. Section 58.445, RSMo Supp. 1973, reads as follows:

"1. If any driver or pedestrian within his jurisdiction dies within four hours of and as a result of an accident involving a motor vehicle, the coroner shall report the death and circumstances of the accident to the Missouri division of highway safety in writing. The report shall be made within five days of the conclusion of the tests required in subsection 2.

"2. The coroner shall make or cause to be made such tests as are necessary to determine the presence and percentage concentration of alcohol, and drugs if feasible, in the blood of the driver or

Mr. Paul W. Collins

pedestrian. The results of these tests shall be included in the coroner's report to the division."

Section 58.449 states:

"The contents of the report and results of any test made pursuant to the requirements or authorizations of sections 58.445 to 58.449 shall be used only for statistical purposes which do not reveal the identity of the deceased."

Reading these two sections together, it seems obvious that the legislature intended that blood alcohol information be collected by the coroner from any driver or pedestrian dying within his jurisdiction as a result of a motor vehicle accident and reported to the Missouri Division of Highway Safety for the sole purpose of the collection and dissemination of statistical data which in no way reveals the identity of the deceased person. Accordingly, a coroner or county medical examiner who collects such blood alcohol information should not release it to anyone other than the Missouri Division of Highway Safety, as provided by Section 58.445, RSMo Supp. 1973.

Yours very truly,

JOHN C. DANFORTH
Attorney General

SEWERS:
FEDERAL GRANTS:
WATER POLLUTION:
CLEAN WATER COMMISSION:
CITIES, TOWNS AND VILLAGES:

The City of Farmington may impose user charges pursuant to Section 204.026 (18), RSMo Supp. 1973, to cover costs of operation and/or future expansion of a public

sewer treatment facility constructed pursuant to a grant of federal funds under 33 U.S.C., Sections 1281-1292, without the necessity of an election as provided in Section 71.715, RSMo 1969.

OPINION NO. 92

March 24, 1975

Honorable Ron Bockenka
Representative, 128th District
State Capitol Building, Room 236-A
Jefferson City, Missouri 65101



Dear Representative Bockenka:

This official opinion is issued in response to your request for a ruling on the following question:

"May the City of Farmington impose user charges to cover costs of operation and/or future expansion of a public sewer treatment facility without the necessity of an election?"

Your question pertains to a public sewage treatment facility constructed by the City of Farmington pursuant to grants from the federal government and the State of Missouri. These grants were made pursuant to Title II of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C., Sections 1281-1292. To be eligible for both the federal and the state grants permitted under these statutes, such projects must be approved by the state water pollution control agency (in Missouri's case, the Clean Water Commission), which has significant administrative and supervisory responsibilities in the design, construction and operation of the projects. 33 U.S.C., Sections 1282 (b) (2), 1284 (a) (2), (3) and (4); Sections 204.101-204.121, 204.136, RSMo Supp. 1973.

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33 U.S.C., Section 1284 (b) (1), (2) and (3), provides as follows, with respect to sewage treatment projects for which such grants are given:

"(1) Notwithstanding any other provision of this subchapter, the Administrator shall not approve any grant for any treatment works under section 1281(g) (1) of this title after March 1, 1973, unless he shall first have determined that the applicant (A) has adopted or will adopt a system of charges to assure that each recipient of waste treatment services within the applicant's jurisdiction, as determined by the Administrator, will pay its proportionate share of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant; (B) has made provision for the payment to each applicant by the industrial users of the treatment works, of that portion of the cost of construction of such treatment works (as determined by the Administrator) which is allocable to the treatment of such industrial wastes to the extent attributable to the Federal share of the cost of construction; and (C) has legal, institutional, managerial, and financial capability to insure adequate construction, operation, and maintenance of treatment works throughout the applicant's jurisdiction, as determined by the Administrator.

"(2) The Administrator shall, within one hundred and eighty days after October 18, 1972, and after consultation with appropriate State, interstate, municipal, and intermunicipal agencies, issue guidelines applicable to payment of waste treatment costs by industrial and nonindustrial recipients of waste treatment services which shall establish (A) classes of users of such services, including categories of

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industrial users; (B) criteria against which to determine the adequacy of charges imposed on classes and categories of users reflecting all factors that influence the cost of waste treatment, including strength, volume, and delivery flow rate characteristics of waste; and (C) model systems and rates of user charges typical of various treatment works serving municipal-industrial communities.

"(3) The grantee shall retain an amount of the revenues derived from the payment of costs by industrial users of waste treatment services, to the extent costs are attributable to the Federal share of eligible project costs provided pursuant to this subchapter as determined by the Administrator, equal to (A) the amount of the non-Federal cost of such project paid by the grantee plus (B) the amount, determined in accordance with regulations promulgated by the Administrator, necessary for future expansion and reconstruction of the project, except that such retained amount shall not exceed 50 per centum of such revenues from such project. All revenues from such project not retained by the grantee shall be deposited by the Administrator in the Treasury as miscellaneous receipts. That portion of the revenues retained by the grantee attributable to clause (B) of the first sentence of this paragraph, together with any interest thereon shall be used solely for the purposes of future expansion and reconstruction of the project." (Emphasis added.)

The Federal Environmental Protection Agency has promulgated regulations implementing these statutory provisions. Federal Register, Vol. 39, No. 29, February 11, 1974. 40 C.F.R., Section 35.925-11 of these regulations requires that, before awarding grant assistance for any sewage treatment project, the Regional Administrator of the Environmental Protection Agency must determine:

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"That, in the case of grant assistance awarded after March 1, 1973, for a project involving Step 2 or Step 3, an approvable plan and schedule of implementation have been developed for a system of user charges to assure that each recipient of waste treatment services within the applicants service area will pay its proportionate share of the cost of operation and maintenance (including replacement as defined in §35.905-17) of all waste treatment service provided by the applicant and the applicant must agree that such system(s) will be maintained. See Appendix B to this subpart."

Appendix B of these regulations includes the requirement that "the user charge system must be incorporated in one or more municipal legislative enactments or other appropriate authority."

The basic question to be answered in this opinion is whether "appropriate authority" exists to require such user charges without requiring a municipal election on the question. Section 71.715 (1), RSMo 1969, provides as follows:

"The governing body of any municipality which has provided common sewers may by ordinance establish just and equitable charges or rents for the use of the sewers to be paid by persons who discharge sewage into the common sewers of the municipality. Any ordinance adopted under this section shall become effective upon its approval by a majority of the votes cast thereon at a general or special municipality election called by the governing body of the municipality. The election on the proposal to impose the sewerage charges or rentals shall be advertised and held in the manner provided by law for advertising and holding special elections in the municipality."

However, Section 204.026 (18), RSMo Supp. 1973, enacted subsequently to Section 71.715, provides as follows:

Honorable Ron Bockenkamp

"The commission shall

* * *

"(18) Require that all publicly owned treatment works or facilities which receive or have received grants from the state or the federal government for construction or improvement make all charges required by sections 204.006 to 204.141 or any federal water pollution control act for use and recovery of capital costs, and the operating authority for such works or facility is hereby authorized to make any such charges;"

We regard Section 204.026 (18) as a grant of authority to municipalities to impose user charges which is separate from and additional to the grant of authority to impose such charges contained in Section 71.715. If it were not considered a separate grant of authority from that contained in Section 71.715, it would be superfluous, and a familiar maxim of statutory construction is that the legislature will not be charged with having done a useless or superfluous act. Cf. State ex rel. Thompson-Stearns-Roger v. Schaffner, 489 S.W.2d 207 (Mo. 1973).

The procedures required to impose user charges under the authority of Section 71.715 are not explicitly required, however, under Section 204.026 (18); nor could they be, for it would clearly be unreasonable to require a referendum election to approve municipal action mandated (not merely permitted) by a state agency pursuant to the latter statute. The question, then, becomes one of whether the appropriate conditions exist for the exercise of the authority to impose user charges conferred by Section 204.026 (18), i.e. whether the Clean Water Commission has required the City of Farmington, as the operator of the treatment facility, to make charges "for use and recovery of capital costs."

The federal grant agreement into which the City of Farmington entered, to obtain funds for the construction of its sewage treatment facility, was offered May 7, 1974, and accepted May 22, 1974, by the Mayor of Farmington. The grant agreement included the condition that the grantee, the City of Farmington:

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" . . . shall comply with all requirements concerning user charges, industrial cost recovery, and sewer use ordinances as provided in . . . the FWPCA Amendments of 1972 (P.L. 92-500) and 40 CFR Part 35, including regulations published in Federal Register, Volume 39, No. 29, February 11, 1974. . . ."

After the acceptance of this agreement, the Clean Water Commission offered its own (State of Missouri) grant to the City of Farmington on May 29, 1974; the Mayor of Farmington accepted this offer on May 30, 1974.

The very issuance of this state grant made it necessary, pursuant to Section 204.026 (18), for the Clean Water Commission to require the institution of user charges by the operating authority of the Farmington treatment facility. The language of Section 204.026 ("The commission shall . . . [r]equire that all publicly owned treatment works or facilities which receive or have received grants from the state or the federal government . . . make all charges required . . . for use and recovery of capital costs, . . ." (Emphasis added.)) is mandatory. The offer of a state grant necessarily implies the condition that the city, if it accepts such offer, will be required to institute a system of user charges for its treatment facility.

This conclusion is strengthened by Section 204.106, RSMo Supp. 1973, which limits state grants to projects:

" . . . which qualify for and in conjunction with federal grants as may be received under the provisions of the Federal Water Pollution Control Act, . . ."

The Clean Water Commission will not entertain an application for a grant of state funds unless and until the municipality seeking the grant has obtained a federal grant; and the municipality can only obtain such a federal grant by agreeing to comply with all applicable federal statutes and regulations, including such provisions as require user charges. Thus, the process by which the Clean Water Commission allots state grants necessarily requires the municipality to institute a system of user charges, as authorized by Section 204.026 (18).

The prerequisites to the institution of user charges by the municipality under the provisions of Section 204.026 (18)

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have therefore been fulfilled and it is not necessary for the municipality to institute such user charges by the method prescribed in Section 71.715.

CONCLUSION

Therefore, it is the opinion of this office that the City of Farmington may impose user charges pursuant to Section 204.026 (18), RSMo Supp. 1973, to cover costs of operation and/or future expansion of a public sewer treatment facility constructed pursuant to a grant of federal funds under 33 U.S.C., Sections 1281-1292, without the necessity of an election as provided in Section 71.715, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Very truly yours,

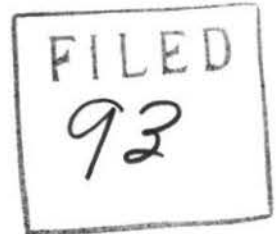
A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

March 3, 1975

OPINION LETTER NO. 93
Answer by Letter - Klaffenbach

Honorable John W. Reid, II
Prosecuting Attorney
Madison County
148 East Main Street
Fredericktown, Missouri 63645



Dear Mr. Reid:

This letter is in response to your question asking:

"Does the solid waste law of 1972 authorize the County Court to contract with the Special Road District for the collection of trash in the District?"

"If the answer is yes, is it within the authority of the Special Road District to collect trash under a contract with the County Court?"

The solid waste disposal law to which you refer is found in Sections 260.200, et seq., RSMo 1973 Supp. Subsection 4 of Section 260.215, provides:

"Cities or counties may contract as provided in chapter 70, RSMo, with any person, city, county, political subdivision, state agency or authority in this or other states to carry out their responsibilities for the storage, collection, transportation, processing, or disposal of solid wastes."

The Chapter 70 reference was undoubtedly to Sections 70.210, et seq., RSMo, which authorize cooperation by political subdivisions, as defined therein. However, such cooperative agreements

Honorable John W. Reid, II

are not authorized unless, as provided in Section 70.220, ". . . the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. . . ." We take this to mean, in these premises, that both political subdivisions must have the power to collect trash.

You state that the special road district about which you inquire is one organized under provisions of Sections 233.170 to 233.315, RSMo.

Since the special road districts organized under Sections 233.170 to 233.315, RSMo do not have the power to collect and dispose of solid waste of others, such districts cannot contract with the county court for the collection of solid waste under the solid waste disposal law.

Very truly yours,

JOHN C. DANFORTH
Attorney General

May 28, 1975

OPINION LETTER NO. 94
Answer by letter-Burns

Honorable Frank Bild
State Senator, District 15
Room 320A, State Capitol Building
Jefferson City, Missouri 65101



Dear Senator Bild:

This opinion letter is in response to your request for an opinion on the following question:

"Does the Missouri Housing Development Commission have authority to make loans to a limited partnership or to an individual."

We have been informed that the Commission takes the view that it has the power under Chapter 215, RSMo, to make loans to limited partnerships or to individuals; and, as a matter of fact, the Commission has made several loans to limited partnerships.

Our review of the provisions of Chapter 215 leads us to the conclusion that the position of the Commission is legally sound.

Yours very truly,

JOHN C. DANFORTH
Attorney General

March 28, 1975

OPINION LETTER NO. 96
Answer by letter-Klaffenbach

Honorable A. J. Seier
Prosecuting Attorney
Cape Girardeau County
721 North Sunset
Cape Girardeau, Missouri 63701



Dear Mr. Seier:

This letter is in response to your questions asking:

- "1. Is a County responsible for transportation costs when there is a commitment to a State Hospital on application of a 'police officer or any other person stating his belief that the individual is likely to cause injury to himself or others if not immediately restrained,' pursuant to RSMo. 202.800?
- "2. Is a County responsible for transportation costs when a patient is taken to a hospital by a 'police officer' pursuant to RSMo. 202.803?
- "3. Is RSMo. 202.440 authority for a police department of a local municipality to charge the county for transportation costs when a patient is confined pursuant to RSMo. 202.800 or RSMo. 202.803?"

You also state that:

"A controversy has arisen between Cape Girardeau County, City of Cape Girardeau Police Department and City of Jackson Police Department relating to transportation costs for patients who have

Honorable A. J. Seier

been confined in State Hospital No. 4 at Farmington, Missouri, under RSMo. 202.800 and RSMo. 202.803. The County takes the position that since these are emergency confinements pursuant to the law and that there is no express authority for the county to be responsible for the mileage and other incidental transportation costs for confinement of these prisoners; they are not liable. Both cities take the position that pursuant to RSMo. 202.440 they can make claim against the county for reimbursement of transportation costs, including overtime of officers necessary to transport a patient to the hospital."

Section 202.440, as amended by the 77th General Assembly, Second Regular Session, H.C.S.S.B. No. 374, states:

"1. The sheriff or other person appointed to transport a patient to or from a state mental facility, as complete compensation for such transportation, shall be allowed the following amounts:

(1) Fifteen cents per mile for each mile to and from the facility;

(2) One dollar per day for the support of the patient while enroute; and

(3) Four dollars per day for each assistant accompanying the sheriff as total compensation to the assistant.

"2. Mileage in each case shall be allowed for the nearest route usually traveled, and the amount allowed as mileage shall cover all transportation expenses of whatever kind and nature.

"3. The costs specified in this section shall be paid out of the county treasury of the proper county."

We believe that the key word in the above section is "appointed." The legal correspondence accompanying your question raises several possible applicable sections. That is, the suggestion has been made that Section 202.800, RSMo, authorizes the probate judge to "appoint" a police officer for the purpose of such transportation. However, our

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review of that section leads us to conclude that it provides that any court of record may authorize a police officer to take the individual into custody. Section 202.803, to which you refer, does not involve any action by a court and is simply an emergency commitment without medical certification authorizing a police officer to take the individual into custody. A custody authorization is not, in our view, an appointment under Section 202.440 for the purposes of payment for transportation notwithstanding the fact that such custody also authorizes transportation to a mental facility.

Section 202.813, RSMo, does require that the county court or the probate court in the City of St. Louis or a class one county, under certain conditions, shall "arrange for the" transportation of a patient who is indigent and about to be hospitalized under Sections 202.797, 202.800, 202.803, or 202.807. The primary duty for such transportation is therefore on the county court or such probate court. This indicates, however, that the county court or such probate court must "arrange" such transportation and that it is the county court or such probate court which "appoints" persons authorized to receive reimbursement under Section 202.440.

In the situations about which you inquire, it appears that the transportation is made without the knowledge or consent of the county court. In such circumstances, we believe the person transporting the patient, even though the patient is indigent, is not entitled to payment under Section 202.440. This is because the county court has the right to "appoint" the sheriff or such persons as it deems necessary or desirable to make such transportation and because, in our view, other transportation not arranged or authorized by the county court is gratuitous.

We realize that the exigencies of the situations arising under the emergency commitment statutes preclude the county court from acting on each individual case. However, in light of the court's responsibility respecting indigent patients, if the sheriff's office is not used for such transportation, arrangements should be made in advance for the appropriate transportation and "appointment" of other persons to act in lieu of the sheriff pursuant to such sections.

If city police officers are appointed by the county court to transport the patient under the provisions of Section 202.813, the charges for such services are limited as provided in Section 202.440.

Because of the nature of the duties of municipal police departments, police officers may be required to transport such patients to hospitals as a part of such duties and not under appointment as provided in Section 202.440. However, in such cases the

Honorable A. J. Seier

costs involved must be borne by such cities and are not chargeable to the county.

Finally, we understand that your questions do not involve any action taken or orders issued under the provisions of Section 475.355, RSMo, and we, therefore, do not discuss the effect of such provisions.

Yours very truly,

JOHN C. DANFORTH
Attorney General

September 22, 1975

OPINION LETTER NO. 97
Answer by Letter - Card

FILED

97

Honorable Jerry E. McBride
State Representative, District 130
Room 118B, Capitol Building
Jefferson City, Missouri 65101

Dear Representative McBride:

This is in response to your request for an opinion of this office on whether a city by ordinance can prohibit the sale of intoxicating liquor on Sunday even if a liquor establishment has been issued a retail by the drink license under the provisions of § 311.095, RSMo, and has also obtained a Sunday bar license pursuant to the provisions of § 311.097, RSMo. You state that a third class city has adopted an ordinance which prohibits the sale of intoxicating liquor and non-intoxicating beer within the city limits between the hours of 1:30 a.m. on Sunday and 6:00 a.m. on Monday. The answer to your question, we believe, must be in the negative.

In Crackerneck Country Club, Inc. v. City of Independence, 522 S.W.2d 50 (Mo.Ct.App. at K.C. 1974) (cause retransferred to the Court of Appeals, April 15, 1975 by the Missouri Supreme Court on the grounds that transfer had been improvidently granted), the Court of Appeals has considered almost the precise question and has held that such an ordinance was void because it was in conflict with state law and because it was prohibitory rather than regulatory. There, Rockwood Country Club and Crackerneck Country Club had been licensed by the State of Missouri to dispense liquor by the drink at retail for consumption on the premises Monday through Saturday pursuant to the provisions of § 311.090, RSMo. They had also qualified and obtained from the State of Missouri a restaurant bar license pursuant to the provisions of § 311.097, authorizing them to sell liquor by the drink on Sundays between the hours of 1:00 p.m. and midnight.

Honorable Jerry E. McBride

The City of Independence adopted an ordinance which totally prohibited the sale of intoxicating liquor by the drink on Sundays by any city licensee.

We see no difference between the question which you raise and the question which was ruled upon by the court in Cracker-neck except for the fact that here the licensees have qualified for a retail by the drink license under the provisions of § 311.095 rather than § 311.090. However, this difference has no bearing on the holding of the court since § 311.095 provides an alternate basis for obtaining the Monday through Saturday retail by the drink license. See Opinion No. 151, issued April 10, 1974, copy enclosed.

Therefore, we must conclude that a city does not have the authority by ordinance to prohibit the sale of intoxicating liquor on Sunday by those holding licenses issued by the State of Missouri pursuant to the provisions of § 311.095 and § 311.097.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 151,
4-10-74, Garrett

AUDITS: (1) The scope of an audit requested
COUNTIES: pursuant to Section 29.230.2, RSMo,
STATE AUDITOR: lays within the discretion of the
CITIES, TOWNS & VILLAGES: State Auditor, provided that discre-
tion is reasonably exercised; (2) the
State Auditor is authorized to include those public offices in the
City of St. Louis performing a function comparable to a county with-
in an audit of the City of St. Louis, requested pursuant to Section
29.230.2, RSMo; and (3) there is no requirement that the political
subdivision, which is to be audited, produce to the Auditor the re-
ceipt of the state collector showing that the cost of such audit has
been paid to the collector.

OPINION NO. 98

March 28, 1975

Honorable George W. Lehr
State Auditor
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Lehr:

This opinion is in response to the questions you have asked
as follows:

- "1) Do I have the sole discretion to deter-
mine the scope of the audit properly re-
quested for the City of St. Louis, pur-
suant to Section 29.230.2, RSMo?
- "2) In determining the scope of said audit,
am I authorized to include those public
offices in the City of St. Louis which
perform a function comparable to county
offices?
- "3) Does Section 29.275, RSMo prevent me, as
State Auditor, from initiating said audit
until I receive a receipt from the Direc-
tor of Revenue, pursuant to said section?"

Concerning your first question, Section 29.230.2, RSMo, states:

Honorable George W. Lehr

"2. The state auditor shall audit any political subdivision of the state, including counties having a county auditor, if requested to do so by a petition signed by five percent of the qualified voters of the political subdivision determined on the basis of the votes cast for the office of governor in the last election held prior to the filing of the petition. The political subdivision shall pay the actual cost of audit. No political subdivision shall be audited by petition more than once in any one calendar or fiscal year."

In the case of Deubler v. Iron County, 93 S.W.2d 899 (Mo. 1936), the Supreme Court of Missouri considered the issue of the Auditor's discretion to establish the scope of an audit requested by residents of a county, pursuant to statutory provisions then existing which were similar in nature to, and statutory predecessors to, Section 29.230.2, RSMo. The county, in that action, attempted to limit the audit to a three year period by refusing to pay for the financial obligation incurred (personal services and expenses of the examiners) for the portion of the audit that went beyond the three year period. While disallowing the extra amount for other reasons, the court held, at page 903:

". . . Since the statute did not limit the period of time the audit should cover or the expense which might be incurred, the only reasonable construction to be given it is that the state auditor was required to make an audit covering the time and at such expense as might be necessary to accomplish all of the proper purposes for which the audit was being made, and that in determining the necessary period to be covered, the state auditor should exercise a reasonable discretion. . . ."

Therefore, it is our view that the scope of an audit requested pursuant to Section 29.230.2, RSMo, is solely within your discretion, provided it is exercised reasonably.

Concerning your second question, Section 29.230.2, RSMo, must again be considered and specifically the portion which reads:

"The state auditor shall audit any political subdivision of the state, including counties

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having a county auditor, if requested to do so by a petition" (Emphasis added)

If the City of St. Louis is considered a political subdivision for the purposes of this statute, then it would appear that the issue would be clearly resolved. However, an analysis of the unique nature of the City of St. Louis is necessary to fully consider the question.

It is our view that the City of St. Louis has been considered a political subdivision of the state since at least 1875. The Supreme Court of Missouri, in Kansas City v. Neal, 26 S.W. 695 (Mo. 1894), stated, at page 696:

". . . 'Subdivision' means to divide into smaller parts the same thing or subject-matter, and no city or town in this state is a subdivision thereof, except the city of St. Louis; and it became so under sections 20, 22, 23, art. 9, Const., and by an act of the legislature, in pursuant thereof, setting off certain defined boundaries defining the city limits, and conferring upon the city all the rights and privileges possessed by a county. . . ." (Emphasis added)

Furthermore, in State on inf. of Barker v. Koeln, 192 S.W. 748 (Mo. Banc 1917), the Supreme Court of Missouri considered whether the collector of the City of St. Louis was a county officer or a city officer. In concluding that the City of St. Louis was to be considered a political subdivision of the state, as are other counties, the court, at page 751, stated:

"The process of logic by which is determined whether the collector of the city of St. Louis is a city officer or a state officer is apt to become confused by reason of the singular and peculiar relationship which the city of St. Louis bears to the state. Loosely speaking any officer elected by the suffrage of the city of St. Louis might be termed a city officer, at least in the sense that he is elected by the vote of the city. The character of the electorate, however, should not necessarily determine the character of the office. The territory confined within the boundaries of

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the city of St. Louis forms a political subdivision of the state. This territory has no county organization in the ordinary use of that term, but by the Constitution the said city is to 'collect the state revenue and perform all other functions in relation to the state, in the same manner, as if it were a county as in this Constitution defined.' If this political subdivision of the state were styled a county, no confusion would arise in arriving at the conclusion that the person whose duty it was to collect the state taxes was an officer of the state, and that his election would be a subject of legislative control.

"Why, then, should the election of the collector of the revenue of the city of St. Louis (a separate political subdivision of the state which, under the Constitution, bears the same relationship to the state as a county) who, at least so far as collecting the revenue ordinarily collected by a county collector, performs the same governmental function, be controlled by a law different from that which controls the election of collectors in the other political subdivisions (counties) of the state? No reason is apparent why the election of one should be controlled by a law different from that applying to other officers exercising a like governmental function, and none can be said to exist unless perchance the power of control over the election of this officer in the city of St. Louis was, by the Constitution, permanently transferred to the charter making power of said city." (Emphasis added)

The court concluded that the state law (Section 11432, Rev.St. 1909) was applicable to the City of St. Louis, as a political subdivision, as it is to counties of the state.

In State on inf. of McKittrick v. Dwyer, 124 S.W.2d 1173 (Mo.Banc 1938), the Supreme Court of Missouri dealt with a similar issue concerning the treasurer of the City of St. Louis. Again the court considered whether the selection of the city treasurer was subject to the provision relating to selection of a county treasurer (1937 M.S.A. §12130) or whether the charter provision of the City of St. Louis (Article VIII, Section 1) prevailed. The court acknowledged, at page 1174, that:

Honorable George W. Lehr

"On the adoption of the 'scheme' for the separation of the city and the county, the city became both a political subdivision of the State and a city in its corporate capacity. . . ."

In concluding that the City of St. Louis was to be included in the interpretation of the law relating to counties, the court also acknowledged the dual role that the office played, at page 1176:

". . . The treasurer of the city performs official duties relating to the city as a political subdivision and also performs official duties relating to the city in its corporate capacity."

See also State ex rel. Walker v. Bus, 36 S.W. 636, 639 (Mo.Banc 1896).

Article VI, Section 31, Missouri Constitution of 1945, states:

"The city of St. Louis, as now existing, is recognized both as a city and as a county unless otherwise changed in accordance with the provisions of this constitution. As a city it shall continue for city purposes with its present charter, subject to changes and amendments provided by the constitution or by law, and with the powers, organization, rights and privileges permitted by this constitution or by law."

The 1945 Constitution did not alter the status of the City of St. Louis, as a political subdivision, as indicated by the Supreme Court of Missouri, en banc, in Stemmler v. Einstein, 297 S.W.2d 467 (Mo.Banc 1956), at pages 469-470, as follows:

"Since the adoption of the Constitution of 1875, the City of St. Louis, by virtue of the provisions of Sections 20-26, Article IX, thereof, has been invested with and has exercised the powers of both a city and county, with the same power reserved over it by the General Assembly, however, under Section 23 of said Article, that it had over other cities and counties of the State. And such of its officers as have performed the

Honorable George W. Lehr

functions and duties generally exercised by county officers have been held to be county officers and subject to the general laws of the State relating to the selection and duties of county officers, as distinguished from municipal officers. State ex rel. Walker v. Bus, 135 Mo. 325, 36 S.W. 636, 639, 33 L.R.A. 616; State on inf. of McKittrick v. Dwyer, 343 Mo. 973, 124 S.W.2d 1173, 1174-1176. It is also provided in Section 1.080 RSMo 1949, V.A.M.S., that whenever the word 'county' is used in any law general in character to the whole State, it shall be construed as applicable to the City of St. Louis unless such a construction be inconsistent with its evident intent or some law specially applicable to the city. But, although it constitutes a legal subdivision of the State and exercises such governmental functions as are generally exercised by the one hundred fourteen counties of this State, the City of St. Louis is not legislatively classified as a county, but as a city. Section 46.040. And the framers of the 1945 Constitution declared in Section 1 of Article VI that the 'existing counties' were 'recognized as legal subdivisions of the state'." (Emphasis added)

See Stemmler, *supra*, generally for a comprehensive review of the problems involved in determining the legal nature of the City of St. Louis. See also Preisler v. Hayden, 309 S.W.2d 645 (Mo. 1958).

It is clear, from the previously cited cases, that the City of St. Louis is one legal entity (a political subdivision of the state) that has a "dual nature." It is also clear that the City of St. Louis has consistently been considered a county for the purposes of statutes which relate to county functions. Indeed, Section 1.080, RSMo, states:

"Whenever the word 'county' is used in any law, general in its character to the whole state, it includes the city of St. Louis, unless such construction is inconsistent with the evident intent of the law, or of some law specially applicable to such city. Whenever the county clerk is authorized or required to perform an act by a law which applies to the

Honorable George W. Lehr

city of St. Louis as well as to the counties of the state, the register of the city of St. Louis is authorized or required to perform the act insofar as it is to be performed in the city."

In light of this, we must next consider whether the City of St. Louis is a "political subdivision" for the purposes of Section 29.230.2, RSMo. In the case of Consolidated School District No. 1 of Jackson County v. Bond, 500 S.W.2d 18 (Mo.Ct.App. at K.C. 1973), the Missouri Court of Appeals, Kansas City District, considered whether a school district is a political subdivision within the application of Section 29.230. The court stated, at page 21:

" . . . The established rule of statutory construction is that the legislative intention must be ascertained if possible from the words used in the statute. State ex rel. Highway Comm. v. Wiggins, 454 S.W.2d 899, 903 (Mo. banc 1970). Here the statute can be construed from the words used. There is no ambiguity and therefore no room for the use of extrinsic aids to construction. (citations omitted) "

Looking to the words used in Section 29.230.2, RSMo, it is our view that the City of St. Louis is a "political subdivision of the state" for the reasons previously expressed. This view is further supported by the supplemental language in the section which states " . . . including counties having a county auditor, . . . " The City of St. Louis has, as previously expressed, been considered a county for the purposes of applying statutory provisions relating to counties. See also State ex rel. McClellan v. Godfrey, No. 58894 (Mo.Banc February 21, 1975).

Furthermore, this office has previously held in Opinion No. 41 to Holman, dated March 7, 1955, that cities are considered political subdivisions of the state for the purposes of Section 29.230, RSMo.

Therefore, it is our view that you are authorized to include within the scope of your audit, pursuant to Section 29.230.2, RSMo, those offices in the City of St. Louis that perform a city function and those that perform a function analogous to that of a county.

Your third question, in effect, is whether Section 29.275, RSMo, is applicable to audits petitioned for pursuant to Section 29.230.2, RSMo. Section 29.275, RSMo, states:

Honorable George W. Lehr

"Before the state auditor performs a duty or service required by law for which a fee is charged, the person requiring the service shall produce to the state auditor the receipt of the state collector of revenue showing that the fee has been paid to him."
(Emphasis added)

Section 29.230.2, RSMo, in relevant part, requires that:

". . . The political subdivision shall pay the actual cost of audit. . . ." (Emphasis added)

Therefore, the question becomes whether the "actual cost" of an audit is considered a "fee" as such word is used in Section 29.275.

It is our view that the "actual cost" of the audit is unknown until the audit is completed and therefore cannot be a "fee" within the meaning of Section 29.275.

In addition, Section 29.275 states that the "person" requiring the service shall produce a receipt from the collector of revenue to the State Auditor. In the case of audits requested pursuant to Section 29.230.2, the "person" requiring the service is at least five percent of the qualified voters of the political subdivision by petition. However, the political subdivision, itself, is required to pay the actual cost. It is our view that this consideration adds further support to our view concerning the nonapplicability of Section 29.275 to this situation.

Therefore, it is our view that Section 29.275 is not applicable to an audit petitioned for pursuant to Section 29.230.2. It follows that you are authorized to initiate an audit pursuant to said section without first being presented with a receipt from the collector of revenue (now director of the department of revenue pursuant to Section 12.2 of C.C.S.H.C.S.S.C.S.S.B. No. 1, First Extraordinary Session, 77th General Assembly).

CONCLUSION

It is the opinion of this office that (1) the scope of an audit requested pursuant to Section 29.230.2, RSMo, lays within the discretion of the State Auditor, provided that discretion is reasonably exercised; (2) the State Auditor is authorized to include those public offices in the City of St. Louis performing a function comparable to a county within an audit of the City of St. Louis,

Honorable George W. Lehr

requested pursuant to Section 29.230.2, RSMo; and (3) there is no requirement that the political subdivision, which is to be audited, produce to the Auditor the receipt of the state collector showing that the cost of such audit has been paid to the collector.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Andrew Rothschild.

Yours very truly,

A handwritten signature in dark ink, appearing to read "J. C. Danforth", written in a cursive style.

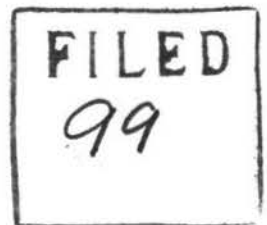
JOHN C. DANFORTH
Attorney General

April 9, 1975

OPINION LETTER NO. 99

Answer by Letter - C. A. Blackmar

Honorable Clarence H. Heflin
State Representative, 78th District
State Capitol Building, Room 304
Jefferson City, Missouri 65101



Dear Representative Heflin:

This letter is in response to your request for an opinion as to whether the provisions of Senate Bill No. 1 of the Second Extraordinary Session of the 77th General Assembly will prevent a loan to an individual or a group of individuals, the proceeds of which are to be used in a business or for the purpose of acquiring an interest in a business, from being secured by a first or second mortgage on residential real estate if the parties intend the loan to be a "business loan" under the bill.

Section 408.015 of the bill contains the following definitions, inter alia:

"'Business loan' shall mean a loan to an individual or a group of individuals, the proceeds of which are to be used in a business or for the purpose of acquiring an interest in a business. The term shall also include a loan to a trust, estate, co-operative, association, or limited or general partnership.

* * *

"'Residential real estate loan' shall mean any real estate used or intended to be used as a residence by not more than four families.

Honorable Clarence H. Heflin

"'Residential real estate loan' shall mean a loan made for the acquisition, construction, repair, or improvement of real estate used or intended to be used as a residence by not more than four families. The term shall also include any loan made to refinance such a loan. No loan secured by residential real estate shall be considered to be a business loan."

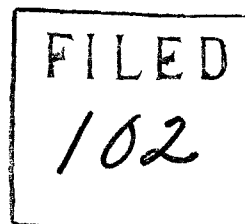
But for the last sentence in the definition of "residential real estate loan" contained in Section 408.015, a loan could satisfy the definition of a "business loan" as used in that section, even though it were secured by "residential real estate." However, the last sentence providing, "No loan secured by residential real estate shall be considered to be a business loan.", leaves no room for ambiguity as to its meaning. A loan secured by residential real estate otherwise falling within the definition of a "business loan" by virtue of the express language in Section 408.015 is not a business loan for the purposes of Senate Bill No. 1, Second Extraordinary Session, 77th General Assembly.

Very truly yours,

JOHN C. DANFORTH
Attorney General

September 10, 1975

OPINION LETTER NO. 102
Answer by letter-Nowotny



Mr. J. Neil Nielsen, Commissioner
Office of Administration
Room 125, State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Nielsen:

This is in response to your request for an opinion concerning the authority of the state to pay the insurance premium on liability insurance for the heads of the Divisions of Design and Construction, Procurement, and Accounting within the Office of Administration and State Highway Patrolmen, and if so, whether the cost may be paid from monies appropriated in Section 4.245, House Bill No. 1004, 77th General Assembly.

The first question is whether professional liability insurance can be furnished by the state for the heads of the Division of Design and Construction, the Division of Procurement, and the Division of Accounting within the Office of Administration.

It is our opinion that such liability insurance can be purchased under the same theory that we held in Opinion No. 93, dated September 9, 1969, to Senator Cason, and in Opinion No. 61, dated January 23, 1975, to Senator Bild, that liability insurance may be provided by a school board and a second class county for employees of such school board and second class county. The theory in such opinions is that such insurance may be furnished as a part of compensation to its employees. This same theory is equally applicable here, and we accordingly so hold that the insurance may be purchased. However, in the case of any state officer who has a fixed salary, such liability insurance may not be provided if the premium payment is in excess of that fixed salary. Accordingly, in such cases, if liability insurance is to be provided, the premium for an officer with a fixed salary must be taken into account and the amount of salary paid by virtue of cash payments must be reduced by the premium amount.

Mr. J. Neil Nielsen

Your second question is whether liability insurance may be purchased pursuant to Section 43.200, subsection 2, V.A.M.S., which reads as follows:

"The superintendent of the patrol shall deposit with the governor a bond to the state of Missouri, duly executed by one or more corporate surety companies authorized to do business in this state, in the penal sum of fifty thousand dollars, conditioned upon the payment to persons injured of all damages arising out of any unlawful search, seizure or arrest made by any member of the patrol under the provisions of subsection 1. An action on the bond may be brought by the person injured in the county of plaintiff's residence or in the county in which the unlawful search, seizure or arrest occurred. The premium for the bond shall be paid by the state out of appropriations made for the support and operation of the highway patrol."

You state the problem is that in practice a "penal bond" cannot be obtained because such a bond is unavailable from surety companies, but that "liability insurance" is available to pay persons injured as a result of a search, seizure or arrest made by members of the Highway Patrol and that such "liability insurance" is the customary way of providing for such protection. Thus, your question is whether "liability insurance" can be purchased in lieu of a "penal bond" or whether only a "penal bond" is authorized.

The first rule of statutory construction is to ascertain and give effect to the legislative intent expressed therein. State ex rel. Eaton v. Gmelich, 106 S.W. 618 (Mo. Banc 1907). A statute should be construed so as to harmonize with reason and common sense, and not so as to lead to a useless result. Scott v. Royston, 123 S.W. 454 (Mo. 1909). It is permissible in construing a statute to argue from the convenience or inconvenience which a given construction will work. Barber Asphalt Paving Company v. Hayward, 154 S.W. 140 (Mo. 1912).

In construing a statute, its object and purpose must be kept in mind and such construction placed upon it as will, if possible, effect its purpose. White v. Greenlee, 85 S.W.2d 112 (Mo. 1935). Finally, words and phrases in a statute or ordinance having a technical meaning are to be considered as having been used in their technical sense, unless it appears that they were intended to be used otherwise and that to interpret them accordingly to their technical import would thwart the legislative purpose. City of St. Louis v. Triangle Fuel Co., 193 S.W.2d 914 (St. L. Ct. App. 1946).

Mr. J. Neil Nielsen

It is clear that the purpose of the statute is to provide some form of insurance coverage in cases of unlawful search, seizure or arrest by members of the Highway Patrol. If the coverage is available by "liability insurance" but not by a "penal bond," we are confident that the legislature did not intend any technical distinction which would interfere with accomplishing the purpose of the law. Therefore, it is our opinion that the legislature did not intend to exclude "liability insurance" coverage in Section 43.200, so long as the coverage accomplishes the purposes of the act.

Your last question is whether such "liability insurance" coverage can be paid for out of the monies appropriated in Section 4.245, House Bill No. 1004, 77th General Assembly. We have reviewed such appropriation to the Commissioner of Administration for the purpose of blanket bond coverage for officials. The purpose here is different from Section 43.200 in that the blanket bond is for the benefit of the state by making payment to the state in case of any wrongdoing on the part of any such state officials covered by the blanket bond. This is entirely different from the purpose of Section 43.200 where the benefits of coverage go to persons damaged by the acts of the members of the Highway Patrol.

Thus, it is our opinion that insurance purchased pursuant to Section 43.200 cannot be paid for out of Section 4.245 of House Bill No. 1004.

Yours very truly,

JOHN C. DANFORTH
Attorney General

April 9, 1975

OPINION LETTER NO. 105
Answer by Letter - Klaffenbach

Honorable Ralph Jones
State Representative, District 74
Room 405, State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Jones:

This letter is in response to your question asking whether the persons you describe as "auxiliary policemen" of the City of Overland may carry firearms and make arrests and the applicability of Section 66.250, RSMo, to such persons.

Whether a person is a police officer depends upon whether or not the person has been commissioned as a bona fide police officer. If the person has not been commissioned as a bona fide police officer he is not a police officer and does not have any greater power to make arrests or to carry firearms than an ordinary citizen.

A bona fide appointed police officer is subject to the provisions of Section 66.250, RSMo Supp. 1973, because such section applies expressly to persons who are "appointed after September 28, 1971, to serve as a police officer in any police department in any county of the first class having a charter form of government." In view of the amendment to such section our Opinion Letter No. 115-1970, is withdrawn.

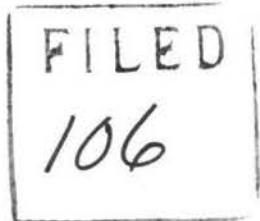
We do not undertake to pass upon any related questions involving ordinances of the city because we do not issue opinions on questions solely involving municipal ordinances.

Very truly yours,

JOHN C. DANFORTH
Attorney General

April 7, 1975

OPINION LETTER NO. 106
Answer by letter-Mittleman



Honorable Jim Arnold
Representative, District 131
c/o House Post Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Arnold:

This letter is issued in response to your request for a ruling on the question of whether a school bus owned by a private contractor and licensed under Section 301.065, RSMo 1969, may be used to transport students to Sunday School.

In our Opinion No. 64 issued June 23, 1953, to the Honorable M. E. Morris, we held that:

" . . . a school bus license is not a proper license for a bus used to transport students to Sunday School. This is either in the case of a school bus owned and operated by a political subdivision under provisions of Section 301.260 . . . or a bus licensed under the provisions of Section 301.060, Laws Mo. 1951, page 700 [a statute subsequently repealed and replaced by Sections 301.055 through 301.069, RSMo 1969]."

The term "school bus" is defined in Missouri's Motor Vehicle Registration Law, Section 301.010(24), RSMo Supp. 1973, as:

" . . . any motor vehicle used solely to transport students to or from school or to transport students to or from any place for educational purposes;" (Emphasis added.)

Honorable Jim Arnold

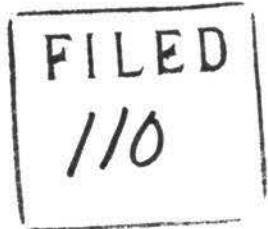
In our Opinion No. 64, we pointed out that this definition of "school bus" should be construed strictly because it in effect creates an exemption allowing a "school bus" to be registered and licensed for a lower fee than other comparable motor vehicles used for the transportation of passengers. We, therefore, regarded the use of a bus to transport students to Sunday School as a use not comprehended in the definition of a "school bus" eligible for such registration and licensing. We adhere to that view in the case of a bus owned by a private contractor. It is our opinion that a bus licensed under Section 301.065 as a "school bus" may not be used to transport students to Sunday School. If it is so used, it must be licensed under other provisions of Chapter 301, RSMo 1969, which apply generally to motor vehicles used for the transportation of passengers.

Yours very truly,

JOHN C. DANFORTH
Attorney General

September 10, 1975

OPINION LETTER NO. 110
Answer by Letter - Klaffenbach



Honorable Harold J. Esser
State Representative, District 33
3 West Glen Arbor Road
Kansas City, Missouri 64114

Dear Representative Esser:

This letter is in response to your question asking which election laws relating to election judges and clerks apply to elections conducted by the Jackson County Board of Election Commissioners for a fourth class city of over 10,000 population and a six-director school district when such elections are held together.

Under Section 162.371, RSMo, the Jackson County Election Board does not conduct school elections in the usual sense. That section merely empowers the board to designate the polling place and appoint election officials within cities having joint elections with school districts. We are doubtful that the election board has authority to appoint election officials in school elections not held concurrently with municipal elections or school elections held outside municipal limits.

The contention has been advanced that Section 111.111, RSMo authorizes the Jackson County Election Board to conduct school elections when such elections are held the same day as municipal elections. We enclose Opinion No. 115, rendered March 13, 1974, to James C. Kirkpatrick. It is clear from such opinion that Section 111.111 has no application when a municipal election and a school election are held on the same day but no state or county election is held on such day. Further discussion in this letter will therefore be based on the provisions of Section 162.371 and the authority of the Jackson County Election Board under provisions of such section and the provisions of Chapter 113, RSMo.

Honorable Harold J. Esser

The Jackson County Election Board is created and receives its authority under Sections 113.490 to 113.870, RSMo. It is also given authority over concurrent school elections within municipal limits under Section 162.371. Under Section 113.560, RSMo, the board has authority to conduct "any and all elections in the county." However, Section 113.520, RSMo, clearly provides that such sections do not apply to "school elections." While the contention has been made that the exemption in Section 113.520 was originally intended to apply only to registration requirements, the exception is still clear and literally without ambiguity. In the absence of ambiguity, we must conclude that the legislature intended the exception relating to school elections to apply to all those provisions found in Sections 113.490 to 113.870, respecting registration and the authority of the election board. Therefore, literally, the election board has no authority over school elections not held concurrently with city elections or outside city limits.

It is our view that the election board cannot contract to conduct elections which it is prohibited by statutes from conducting.

Further, it is our view that in school elections not held concurrently with city elections and in election precincts outside city limits, judges and clerks are to be appointed by the board of education. We reach this conclusion because Section 162.371, relative to six-director school districts, authorizes the board of election commissioners to designate the polling place for both the school district and the municipality holding concurrent elections and to designate the election officials in each precinct to conduct the election for all the subdivisions involved but expressly provides that the board of education shall designate the polling places for voters who reside outside the corporate limits of the cities holding elections concurrent with the school district, and also clearly provides that the school board "shall appoint three judges and two clerks of election for each polling place designated by the school board."

The election board has authority and is required to appoint election officials in elections conducted by it under the provisions of Sections 113.630 and 113.650, RSMo. However, these provisions apply only to elections under Sections 113.490 to 113.870 and not to school elections under Section 162.371, except where there are joint elections within the municipality because such section expressly provides that their application is so limited.

It is also our view that where the election board appoints election officials in joint municipal and school elections within

Honorable Harold J. Esser

the city limits, the board is to appoint election officials under the provisions of Sections 113.490 to 113.870 because the provisions of Section 162.371, which apply to the appointment of judges and clerks appointed by the board of education, expressly apply only to the situation where the board of education makes the appointments, i.e., outside the city limits, and not to the appointment of election officials by the election board.

Election officials in municipal elections in cities of over 10,000 population are appointed as provided in Sections 113.490 to 113.870 under provisions of Section 113.530, RSMo.

We acknowledge and appreciate the views of other counsel in reaching our conclusions. It can readily be observed from the diversity of opinion however that the subject matter is one requiring legislative attention.

Very truly yours,

JOHN C. DANFORTH
Attorney General

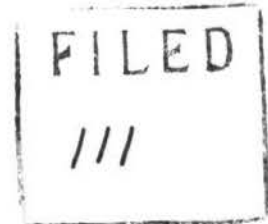
Enclosure: Op. No. 115
3/13/74, Kirkpatrick

SCHOOLS: The board of education of a six-director
SCHOOL TRANSPORTATION: public school district is not authorized
by Section 167.231, RSMo, to submit to
the voters of the district the question of whether transportation
to and from school at the expense of the district should be provided
for pupils living one mile or more from school.

OPINION NO. 111

April 21, 1975

Honorable S. Sue Shear
Representative, District 76
c/o House Post Office
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Shear:

This is in response to your request for an opinion from this
office as follows:

"Upon receipt of a petition signed by ten
resident taxpayers of the district is the
board of education of a six-director public
school district obligated, under Section
167.231 R.S.Mo., to submit the proposition
of providing transportation to and from
school at the expense of the district for
pupils living more than one mile from school
to the voters?

"Does a board of education have the power
to submit the question above to the voters
in the event it wishes to be guided in its
decision by the voters?"

We understand from the information submitted there are more
than ten taxpayers who have petitioned the board of education of
the School District of Clayton, Missouri, to submit to the voters
at the next annual school election the question whether the Clayton
School District should provide transportation to and from school at
the expense of the district for pupils living more than one mile
from school. You inquire whether the board of education is required
to submit this proposition to the voters of the District when re-
quested by a petition signed by ten or more taxpayers in the Dis-
trict, and also whether the board of education has the power to sub-
mit the question to the voters in the event it wishes to be guided
in its decision by voters.

Honorable S. Sue Shear

Section 167.231, RSMo Supp. 1973, provides as follows:

"Within all school districts except metropolitan districts the board of education shall provide transportation to and from school for all pupils living more than three and one-half miles from school and may provide transportation for all pupils living one mile or more from school. When the board of education deems it advisable, or when requested by a petition signed by ten taxpayers in the district, to provide transportation to and from school at the expense of the district for pupils living more than one-half mile from school, the board shall submit the question at an annual or biennial meeting or election or a special meeting or election called for the purpose. Notice of the election shall be given as provided in section 162.061, RSMo. If two-thirds of the voters voting at the election are in favor of providing the transportation, the board shall arrange and provide therefor."

Under this statute, it is mandatory for the school board to furnish transportation for pupils living more than three and one-half miles from school; and it is discretionary with the school board whether they provide transportation for pupils living one mile or more from school. There is no provision for either of these questions to be submitted to the voters at an annual school election or at a special school election for this purpose. No election of public body or agency may be held unless provided for by law. State ex rel. McHenry v. Jenkins, 43 Mo. 261 (1869); State ex inf. Rice ex rel. Allman v. Hawk, 228 S.W.2d 785 (Mo. 1950). Public school boards obtain their authority by statute and have no inherent power. Cape Girardeau School Dist. No. 63 of Cape Girardeau County v. Frye, 225 S.W.2d 484 (St.L.Ct.App. 1949).

In State ex rel. Edwards v. Ellison, 196 S.W. 751, 752-753 (Mo.Banc 1917), the question before the court was the validity of a local option election ordered by the county court concerning the sale of intoxicating liquors within two years subsequent to an election on the same question. The statute provided that the question should not be submitted again within four years next after an election thereafter. The Supreme Court, in holding that the county court had no jurisdiction to entertain a petition to hold the election, stated as follows:

Honorable S. Sue Shear

"County courts have no inherent authority to call local option elections. Their jurisdiction is derived solely from the statute. Section 7238 authorizes, generally, the calling of an election, and section 7244 specifically prohibits its being called during a named period. The court has no more jurisdiction to call such an election during a period covered by section 7244 than it would have to call one if there were no section 7238. . . ."

This same principle of law applies to school boards.

It is our opinion that the board of education of a six-director public school district is not required under Section 167.231 to submit the proposition of whether transportation at the expense of the district should be provided for pupils living more than one mile from school because the statute does not provide for such an election. The board of education has no authority on its own initiative to submit such question to the voters at an annual or special election for the same reason. It is our view that it would be an unlawful expenditure of public funds for the conduct of an election not provided for by statute.

CONCLUSION

It is the opinion of this office that the board of education of a six-director public school district is not authorized by Section 167.231, RSMo, to submit to the voters of the district the question of whether transportation to and from school at the expense of the district should be provided for pupils living one mile or more from school.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,



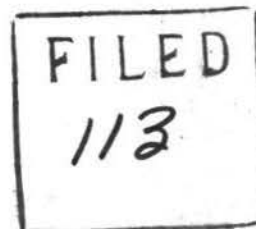
JOHN C. DANFORTH
Attorney General

CIRCUIT ATTORNEYS: The prosecuting attorney in each county
PROSECUTING ATTORNEYS: and the circuit attorney of the City of
 St. Louis have authority to institute
civil collection remedies for the collection of moneys assigned to
the state under the provisions of Public Law 93-647, relating to fa-
mily support.

OPINION NO. 113

June 25, 1975

Mr. Lawrence Graham, Director
Department of Social Services
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Mr. Graham:

This is in response to your request for an opinion from this
office as follows:

"Pursuant to Public Law 93-647, 93rd Con-
gress, H. R. 17045, Part D, Section 456
(a), which in part states:

'The support rights assigned to
the State under section 402 (a)
26 shall constitute an obliga-
tion owed to such State....,'

may prosecuting attorneys in this State in-
stitute civil collection remedies under Sec-
tions 56.060 and 56.070 (RSMo. 1969) for the
recovery of monies owed to the State of Mis-
souri pursuant to the aforesaid public law?
Does your answer to the preceding apply to
the Prosecuting Attorney of the City of St.
Louis?"

You further state that Public Law 93-647 requires all states
to establish an effective program for "locating absent parents, es-
tablishing paternity, and obtaining child support" and that under
the provisions of this law if the state fails to establish such a
program, it would incur the loss of five percent of its aid for de-
pendent children funds.

For the purposes of this opinion, we assume that your state-
ment as to the requirements of Public Law 93-647, 93rd Congress,

Mr. Lawrence Graham

H. R. 17045, is correct and you want to know whether prosecuting attorneys in this state may institute civil collection remedies for the recovery of moneys owed to the state of Missouri pursuant to the aforesaid Public Law.

Public Law 93-647, 93rd Congress, H. R. 17045, 42 U.S.C. 656, provides in part:

"Sec. 456. (a) The support rights assigned to the State under section 402(a)(26) shall constitute an obligation owed to such State by the individual responsible for providing such support. Such obligation shall be deemed for collection purposes to be collectible under all applicable State and local processes." (Emphasis supplied)

Section 56.060, RSMo, provides in part:

"Each prosecuting attorney shall commence and prosecute all civil and criminal actions in his county in which the county or state is concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county. . . ."

Under this statute, it is the duty of the county prosecuting attorney to prosecute civil actions in which the state is concerned.

Section 56.070, RSMo, provides in part as follows:

"The prosecuting attorney shall represent generally the county in all matters of law, investigate all claims against the county, and draw all contracts relating to the business of the county. . . ."

Section 56.430, RSMo, provides in part:

"At the general election to be held in this state in the year 1948, and every four years thereafter, there shall be elected in the city of St. Louis one circuit attorney, who shall reside in said city, and shall possess the same qualifications and be subject to the same duties that are prescribed by this chapter for prosecuting attorneys throughout the state, . . ."

Mr. Lawrence Graham

Under this statute, the circuit attorney of the City of St. Louis has the same duties and responsibilities in this respect as prescribed by law for prosecuting attorneys throughout the state.

In State ex rel. Thrash v. Lamb, 141 S.W. 665 (Mo. 1911), the provisions of what is now Section 56.060, RSMo, were considered by the court; and the court stated, l.c. 669, as follows:

"The history of this legislation shows that since, 1825, it has been the policy of this state, as indicated by the various acts passed by the Legislature, to impose upon the local state's attorney, whether known as the circuit or prosecuting attorney, the duty of instituting proceedings in behalf of the State in matters arising within his local jurisdiction. . . ."

In State to Use of Consolidated School Dist. No. 42 of Scott County v. Powell, 221 S.W.2d 508 (Mo. 1949), the above-statutory provisions were considered by the court in an action by the prosecuting attorney to recover funds allegedly to have been illegally expended by members of the school board. The court stated, l.c. 510:

"Section 12942, R.S.1939, Mo.R.S.A., expressly provides that 'the prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned * * *.' Section 12944, R.S.1939, Mo.R.S.A., provides that 'he shall prosecute or defend, as the case may require, all civil suits in which the county is interested * * *.' Neither the word 'concerned' nor the word 'interested' is defined, but one of the definitions given for the word 'concerned' is 'affected, disturbed, troubled, interested; as to be concerned for one's safety.' Webster's New International Dictionary (2nd Edition). There can be no doubt that the state was interested, concerned and affected by the illegal transfer and dissipation of the Teachers' Funds of this school district."

Under the provisions of Public Law 93-647, the support rights assigned to the state constitute an obligation owed to the state by the individual responsible for providing such support. Certainly,

Mr. Lawrence Graham

the state of Missouri is concerned in collecting all moneys it is entitled to receive under an assignment as provided for under the provisions of Public Law 93-647; and the prosecuting attorney is not only authorized but it is his duty to institute civil proceedings for the recovery of moneys owed to the state of Missouri and this applies also to the circuit attorney of the City of St. Louis.

CONCLUSION

It is the opinion of this office that the prosecuting attorney in each county and the circuit attorney of the City of St. Louis have authority to institute civil collection remedies for the collection of moneys assigned to the state under the provisions of Public Law 93-647, relating to family support.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

May 27, 1975

JOHN C. DANFORTH
ATTORNEY GENERAL

OPINION LETTER NO. 114

Mr. James I. Kennedy
Executive Secretary
State Milk Board
909 Missouri Boulevard
Jefferson City, Missouri 65101

Dear Mr. Kennedy:

This is in response to your request for an opinion which request reads as follows:

"Under Section 196.935 Missouri Revised Statutes Cumulative Supplement 1973 Annotations are the producers and bottlers of Grade A retail raw milk exempted from the requirements of the section to have their milk graded, produced, transported, processed, manufactured, distributed, labeled, and sold under state milk inspection and produced in a manner prescribed by regulations authorized by Section 196.939 and under proper permits issued thereunder?"

Section 196.935, RSMo Supp. 1973, provides as follows:

"No person shall sell, offer for sale, expose for sale, transport, or deliver any graded fluid milk or graded fluid milk products in this state unless the milk or milk products are graded and produced, transported, processed, manufactured, distributed, labeled and sold under state milk inspection and the same has also been produced or pasteurized as required by a regulation authorized by section 196.939 and under proper permits issued thereunder. Only pasteurized graded

Mr. James I. Kennedy

fluid milk and fluid milk products as defined in subdivision (3) of section 196.931 shall be sold to the final consumer, or to restaurants, soda fountains, grocery stores, or similar establishments; except an individual may purchase and have delivered to him for his own use raw milk or cream from a farm." (Emphasis added)

Section 196.931(3), RSMo Supp. 1973, defines "graded fluid milk and fluid milk products" as including:

". . . cream, light cream, coffee cream, table cream, whipping cream, light whipping cream, heavy cream, heavy whipping cream, whipped cream, whipped light cream, whipped coffee cream, whipped table cream, sour cream, cultured sour cream, half-and-half, sour half-and-half, cultured half-and-half, reconstituted or recombined milk and milk products, concentrated milk, concentrated milk products, skim milk, skimmed milk, lowfat milk, fortified milk and milk products, vitamin D milk and milk products, homogenized milk, flavored milk or milk products, eggnog, eggnog flavored milk, eggnog flavored lowfat milk, buttermilk, cultured buttermilk, cultured milk, cultured whole milk buttermilk, and acidified milk and milk products, and other fluid milk and fluid milk products so declared by the board which are sold, offered for sale, exposed for sale, delivered or advertised as graded milk and milk products;" (Emphasis added)

In June, 1973, the State Milk Board promulgated regulations for the production and distribution of Grade A retail raw milk and milk products. These regulations provide, inter alia, that every producer-distributor producing and distributing Grade A retail raw milk shall secure a permit from the state authority. The regulations further provide for proper labeling of containers, inspection of production and distributing facilities, and the examination and grading of Grade A retail raw milk and milk products.

It is apparent from the above statutes that all graded fluid milk and fluid milk products are subject to the regulatory provisions of Section 196.935. Graded fluid and fluid milk products

Mr. James I. Kennedy

include, in addition to the specifically named items, any

" . . . other fluid milk and fluid milk products so declared by the board which are sold, offered for sale, exposed for sale, delivered or advertised as graded milk and milk products;"

Pursuant to Section 196.939, RSMo Supp. 1973, the State Milk Board promulgated the aforementioned regulations concerning Grade A retail raw milk.

It is our view that the producers and bottlers of Grade A retail raw milk which is sold, offered for sale, exposed for sale, delivered or advertised as graded milk are not exempted from the requirements of Section 196.935 or the rules promulgated thereunder by the State Milk Board.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

TAXATION (CIGARETTES):

Under provisions of House Bill No. 1612 of the 77th General Assembly, a cigarette wholesaler who purchases cigarette tax stamps or meter units on a deferred payment basis must pay for such stamps or meter units on or before the fifteenth day of the month following the month in which the stamps or meter units were purchased.

OPINION NO. 115

June 26, 1975

Honorable Lawrence J. Lee
Missouri Senate, 3rd District
506 Olive Street
St. Louis, Missouri 63101



Dear Senator Lee:

This is in response to your request for an opinion from this office regarding the correct interpretation of Section 4 of House Bill No. 1612 passed by the 77th General Assembly. In particular you have asked whether a cigarette wholesaler who purchases cigarette stamps or meter units on a deferred basis can pay for the stamps or units within thirty days after the date of purchase without being delinquent.

Section 4 of House Bill No. 1612 of the 77th General Assembly provides for a cigarette tax as follows:

"1. Any wholesaler desiring to purchase stamps or meter units on a deferred payment basis, shall file with the director, a surety bond in an amount equal to the estimated total monthly tax liability of the wholesaler. The amount of deferred payment granted at no time shall exceed the total amount of the bond filed by the wholesaler. The director may also require any wholesaler purchasing stamps in this manner to file certain reports or keep certain records as the director may deem necessary.

"2. In the event that payment of the total deferment liability becomes delinquent after fifteen days from the last day of the month during which the purchase was made, the director shall revoke the license held by the

Honorable Lawrence J. Lee

wholesaler, subject to other provisions of this chapter, for a period of one year and shall notify the bonding company requesting that payment be made under the terms of the bond."

It should be noted that this is the first enactment of Missouri law authorizing the deferred payment of cigarette tax. As a result, there is no body of case law defining the rights of the parties to the deferred payment scheme of House Bill No. 1612. It is therefore necessary to look to the statute itself for guidance in its application.

The words of the statute must be viewed as controlling unless there is no way of reaching a reasonable result within those terms. In Bussman Manufacturing Company v. Industrial Commission, 335 S.W.2d 456 (St.L.Ct.App. 1960), the court stated:

" . . . We have no authority to supply or insert words in a statute unless there is an omission plainly indicated and the statute as written is incongruous or unintelligible and leads to absurd results. . . ."
Id. 460.

The Supreme Court of Missouri supplies further guidance regarding statutory construction, ". . . If the language used is plain and unambiguous, there is no reason for any construction, . . ." United Air Lines, Inc. v. State Tax Commission, 377 S.W.2d 444, 448 (Mo.Banc 1964).

It is proper then to inspect the statute for its completeness and for its lack of ambiguity.

Paragraph 2 of Section 4 contains the relevant language regarding payment of deferred liabilities. It states, "In the event that payment of the total deferment liability becomes delinquent after fifteen days from the last day of the month during which the purchase was made, the director shall revoke the license. . ." of the wholesaler for a period of one year. Two terms from this section require definition: "delinquent" and "total deferment liability."

Webster's New International Dictionary, Second Edition, Unabridged, defines delinquent as "failing in duty; offending by neglect or violation of duty or of law." A delinquency regarding payment would obviously be a failure to satisfy one's duty or obligation to make the payment. The only problem one confronts

Honorable Lawrence J. Lee

in this regard is ascertaining when one has the "duty or obligation" to pay.

The statute clearly indicates that a delinquency can occur as early as the sixteenth day of the month following the month in which the tax stamps or meter units were purchased. No mention whatever is made of other dates upon which accounts may become delinquent. Therefore, accounts become delinquent on the sixteenth day of the month following the month in which the meter units or stamps were purchased on a deferred payment basis.

The phrase "total deferment liability" must refer to the amount of unpaid tax stamp or meter unit acquisitions from the previous month. Thus, if during the previous month, \$8,000 worth of meter units or tax stamps had been acquired on a deferred payment basis, and subsequently, \$2,000 was remitted prior to the fifteenth day of the month following the month of purchase, the total deferment liability on the fifteenth day of the month succeeding the month of purchase would be \$6,000.

Section 4, paragraph 2 of House Bill No. 1612 of the 77th General Assembly can only be given reasonable effect by concluding that payment is deferred for as many as forty-six days and as few as fifteen days. All purchases made in any month are required to be paid before the sixteenth of the succeeding month. Any deferment liability of preceding months remaining unpaid after the fifteenth day of the succeeding month is delinquent. Such a delinquency constitutes cause for revocation of the wholesaler's license.

CONCLUSION

It is the opinion of this office that under provisions of House Bill No. 1612 of the 77th General Assembly, a cigarette wholesaler who purchases cigarette tax stamps or meter units on a deferred payment basis must pay for such stamps or meter units on or before the fifteenth day of the month following the month in which the stamps or meter units were purchased.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John D. Ashcroft.

Very truly yours,



JOHN C. DANFORTH
Attorney General

SCHOOLS: Employment "in any other school system,"
TEACHERS: as that phrase is used in Section 168.
104(5), RSMo 1969, includes any full-time
teaching position, whether inside or outside of Missouri and whether
in public or private schools. It includes teaching service in a junior
college, four-year college, or university and in a bona fide
early childhood or preschool program.

OPINION NO. 116

May 28, 1975

Dr. Arthur L. Mallory
Commissioner of Education
Department of Elementary and
Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This official opinion is in response to your request for a
ruling on the following questions:

"Section 168.104, Subsection 5 of the Revised Statutes of Missouri provides in part that 'in the case of any probationary teacher who has been employed in any other school system as a full-time teacher for two or more years, the board of education shall waive one year of his probationary period.'

- "1. Shall the board of education waive one year of a teacher's probationary period for being employed as a full-time teacher for two or more years in another school system outside the state of Missouri?
- "2. Shall the board of education waive one year of a teacher's probationary period for being employed as a full-time teacher for two or more years in nonpublic elementary and secondary schools?
- "3. Shall the board of education waive one year of a teacher's probationary period for being employed as a full-time teacher for two or more years in a junior college or a four-year college or university?

Dr. Arthur L. Mallory

- "4. Shall the board of education waive one year of a teacher's probationary period for being employed as a full-time teacher for two or more years in a school offering only an early childhood or pre-school program?"

At the outset, we note that the Teacher Tenure Act, Sections 168.102 through 168.130, RSMo 1969, provides for "probationary" and "permanent" teachers, the difference between them being the length of service in the district. A permanent teacher is defined as:

". . . any teacher who has been employed or who is hereafter employed as a teacher in the same school district for five successive years and who has continued or who thereafter continues to be employed as a full-time teacher by the school district; . . ." (Section 168.104(4))

However, Section 168.104(5), the section with which your opinion request deals, provides that:

". . . In the case of any probationary teacher who has been employed in any other school system as a full-time teacher for two or more years, the board of education shall waive one year of his probationary period;"

The answer to your question depends on the definition of the phrase "employed in any other school system as a full-time teacher." The phrase is not defined in the Teacher Tenure Act, and we are unable to find any judicial definition of that phrase either from Missouri or elsewhere. In order to ascertain its meaning, therefore, we must try to determine the context in which it was used.

The status of "probationary teacher" was established so that a school district could evaluate the performance of a teacher over a period of years before that teacher became eligible for permanent status. A teacher who has had prior teaching experience, however, is not required to wait the full five years before acquiring permanent status. This is so both because the school district can obtain an evaluation of that teacher's earlier work from his previous employer and because that earlier work has provided experience which presumably makes the teacher more valuable to the school district.

Your opinion request asks whether the prior teaching experience is limited to particular schools or particular age groups. We do not

Dr. Arthur L. Mallory

believe it is. So long as a person has been employed as a full-time teacher for two years, it should not matter whether the school system was public or private and in Missouri or not. Further, we believe that this statute includes bona fide early childhood or pre-school teaching experience and teaching in a college or junior college. Employment in any of these situations allows evaluation of the teacher's earlier work and gives the teacher experience which makes the teacher more valuable to the district.

CONCLUSION

It is, therefore, the opinion of this office that employment "in any other school system," as that phrase is used in Section 168.104(5), RSMo 1969, includes any full-time teaching position, whether inside or outside of Missouri and whether in public or private schools. It includes teaching service in a junior college, four-year college, or university and in a bona fide early childhood or preschool program.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

Yours very truly,



JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

May 1, 1975

OPINION LETTER NO. 120

Honorable Harold L. Lowenstein
Representative, District 34
Room 104, State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Lowenstein:

This letter is in response to your question asking:

"'Section 120.750, RSMo. (Amended by Laws 1969, p. 237, section 1) provides in Sub-section 2 that 'a Party committee may adopt a Constitution or By-Laws or both.' Do such By-Laws adopted by a Party Committee remain in effect beyond the following Primary Election when the membership of the Committee may be changed as a result of such Primary Election? Does the language in Sub-Section 2 of Section 120.750 that '.... within any 60-day period after the required Committee Organizational Meeting following the Primary Election, any such... By-Laws may be changed or amended by a majority vote of the total membership of such Committee' indicate that the By-Laws of the previous Party Committee continue in effect after such Primary Election?'"

Subsection 2 of Section 120.750, RSMo Supp. 1973, to which you refer, provides:

"A party committee may adopt a constitution or bylaws or both. Such constitution or by-laws may have any provisions not in conflict with the laws of the state of Missouri. Changes to such party rules may require no greater than a two-thirds vote of the total membership

Honorable Harold L. Lowenstein

of a committee. However, within any sixty-day period after the required committee or organizational meeting following the primary election, any such constitution or bylaws may be changed or amended by a majority vote of the total membership of such committee."

We note that in the case of Scott v. Natchitoches Parish Democratic Executive Committee, 121 So.2d 766 (La. 2nd Cir. 1960), the court stated at l.c. 768-769:

"It is urged on behalf of defendant that the State Central Committee is not a continuing body, and, accordingly, that the resolution, shown by the certificate to have been adopted September 5, 1959, was not in effect in June, 1960, at which time a newly constituted State Central Committee had taken office.

"Frankly, this argument is so tenuous and unreasonable that it hardly justifies notice. We think it is generally accepted that the rules and regulations of any legislative or administrative body continue in effect despite changes in the composition of said group. We think the point is covered by LSA-R.S. 18:294, which provides, in part:

'The state central committee may adopt for its government and for the government of any committee in this Part authorized to be created, any rules and regulations not inconsistent with the constitution and laws of the state or of the United States.'

"Certainly the adoption of rules and regulations, until altered or rescinded, must continue in effect. . . ."

It is our view that the above subsection indicates it is the legislative intent that the rules of the committee are continuous and remain in effect until amended as provided therein.

Yours very truly,



JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

May 7, 1975

OPINION LETTER NO. 122

Harold P. Robb, M.D., Director
Department of Mental Health
Post Office Box 687
Jefferson City, Missouri 65101

Dear Dr. Robb:

This letter is response to your question asking:

"Do benefits such as state welfare, social security, veterans' benefits, etc. received by or on behalf of patients (who may be either on extended care or inpatients) reduce or eliminate charges to counties because the amount received by, paid on or in behalf of patients (who otherwise would be supported by counties as either senile patients or county indigents under Section 202.863 and 202.480 RSMo.) exceeds that amount that would be paid by the county to the state?"

Section 202.480, RSMo, provides in full:

"1. Beginning in January, 1949, on or before the last day of each month the superintendent and his staff in each of the state hospitals shall determine if any patient in the hospital, who was admitted for the first time on or after January 1, 1949, is a senile custodial care case. The decision of the superintendent and his staff on such question shall be final. When it has been so determined that

Harold P. Robb, M.D.

any patient is a senile custodial care case the superintendent shall immediately notify the county court of the county from which the patient came by certified mail.

"2. It shall be the duty of the county court to remove such person from the state hospital and to make necessary arrangements for such person's care. If the patient has not been removed within thirty days after the certified notice has been received by the county court, the charge per month shall automatically become a sum fixed by the division, not to exceed nine percent of the actual cost to the state less whatever amount is paid by or in behalf of the patient instead of the amount paid by the county courts for support of their indigent mentally ill or retarded in facilities of the division until the patient is removed.

"3. For the purposes of this section, 'a senile custodial care case' shall mean a person who is suffering from a mental derangement as a result of old age but whose needs are such that he can be cared for by ordinary home care methods." (Emphasis added).

Subsection 4 of Section 202.863, RSMo, which is applicable to inpatient county charges, provides:

"4. The county of residence of a county mentally ill or retarded inpatient shall pay semiannually in cash, in advance, for the support of such patient a sum fixed by the division, not to exceed three percent of the actual cost to the state less whatever amount will be paid by or in the behalf of the patient. Upon the death or removal of a county patient from the facility the superintendent shall refund to the county the amount that may remain unexpended for his care and treatment. The county of residence shall pay for other than inpatient service quarterly after the service is rendered three percent of the actual cost to the state less whatever amount has been paid by or in behalf of the patient. For the purpose of raising the sums of money

Harold P. Robb, M.D.

required for the care of county patients, the county courts of the several counties are authorized and required to discount and sell their warrants whenever it becomes necessary." (Emphasis added).

It is our view that the legislature intended, by the use of the underscored language, that the Department deduct from the amount due from the counties the sums received from any other source on behalf of the patient, including welfare, social security and veterans' administration benefits.

Thus, if the amounts so received on behalf of the patient exceed the amounts chargeable to the counties under such sections the counties should not be charged for such patients.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

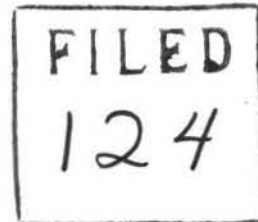
JOHN C. DANFORTH
Attorney General

COUNTIES: (1) Soil and water conservation dis-
SOIL DISTRICTS: tricts, organized under the provisions
CONSTITUTIONAL LAW: of Chapter 278, RSMo, are not private
SOIL & WATER CONSERVATION: corporations, but are public, politi-
cal subdivisions of the state, and (2)
Section 278.145, RSMo 1969, providing for aid to soil and water con-
servation districts from cities and counties, does not violate Article
VI, Section 25, Missouri Constitution.

OPINION NO. 124

June 10, 1975

Mr. James L. Wilson, Director
Department of Natural Resources
Post Office Box 176
Jefferson City, Missouri 65101



Dear Mr. Wilson:

This is in response to your request for an opinion of this of-
fice on the following questions:

- "1. Is a soil and water conservation dis-
trict, organized under the provisions
of Chapter 278, RSMo., a private asso-
ciation or corporation, which is re-
ferred to in Article VI, Section 25 of
the Missouri Constitution?
- "2. Does Section 278.145 violate Article VI,
Section 25 of the Missouri Constitution?"

Chapter 278, RSMo 1969, is entitled "Soil Conservation," Sec-
tion 278.145 states:

"The county court of any county or the gov-
erning body of any city, town or village in
which a soil and water conservation district
lies in whole or in part may cooperate with
the supervisors of the district in carrying
out the purposes of the district program, and
in the event the county court or governing
body finds that the benefits accruing to the
county or municipal area by reason of the pro-
gram of the soil and water conservation dis-
trict justify such action, the county court
or governing body may contribute money, ser-
vices or the use of equipment to the district."

Mr. James L. Wilson

Article VI, Section 25, Missouri Constitution, states, inter alia, that:

"No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation . . ."

The first question you have raised is whether the soil and water conservation districts referred to in Section 278.145 are private associations or corporations. Under the existing case law in this state, the courts have held that districts of a similar nature are not private corporations, but are public, political subdivisions of the state. In Morrison v. Morey, 48 S.W. 629, 633 (Mo. 1898), the court stated:

". . . It is manifest that the levee district is not a private corporation. A private corporation is an aggregation of individuals, who have voluntarily associated themselves together. Here the levee district is constituted by the county court laying out the district, and a majority vote of the landowners in the district may order the work to be done. While the law requires a notice to be given of intention to apply to the county court for the formation of the district, it leaves the power to form the district in the court. The landowners can defeat the whole scheme by refusing, by a majority vote, to order the work done; and thus nullify the action of the county court in forming the district. Still the minority are drawn into it involuntarily, and this could not be done if it were a private corporation. It is a public, political subdivision of the state, which the state has the power to create, under its police powers, and as such subdivision it exercises the prescribed functions of government in the district. . . ."

Likewise, in Bohannon v. Camden Bend Drainage Dist., 208 S.W.2d 794 (K.C.Mo.App. 1948), the court stated:

". . . It is the law that a drainage district is a political sub-division of the

Mr. James L. Wilson

state, which state, under its police powers has the right to create, and as such sub-division it has authority to exercise prescribed functions of government in the district and, in carrying out the objects of its incorporation, it is exercising the police powers of its state. . . ."

In Opinion No. 327, Butler, July 28, 1966, this office concluded that:

". . . soil and water conservation districts created pursuant to Section 278.060, et seq. RSMo, Cum. Supp. 1965, are contemplated by and considered as 'public bodies' under the provisions of Section 290.210 (6) Cum. Supp. 1965, and are subject to the provisions of the prevailing wage law."

Likewise, in Opinion No. 304, Norbury, August 22, 1967, this office concluded that:

". . . soil and water conservation districts are governmental agencies of the state and do not come within the purview of Chapter 236, RSMo, which requires private persons or corporations to obtain permission of the circuit court to build dams for mills, electric power or other machinery; . . ."

On the basis of the above opinions and case law, it is apparent that a soil and water district is not a "private individual, association or corporation" as stated in Article VI, Section 25, Missouri Constitution.

Your second question concerns whether Section 278.145 violates Article VI, Section 25, Missouri Constitution. As stated above, Article VI, Section 25, Missouri Constitution, prohibits any political subdivision of this state from lending its credit or granting public money or property to any private individual, association, or corporation. Section 278.145, RSMo 1969, provides that counties and cities may contribute money, services, or the use of equipment to soil and water conservation districts. Since a soil and water conservation district is a public, political subdivision of the state, and not a private corporation, Section 278.145 does not violate Article VI, Section 25, Missouri Constitution.

Mr. James L. Wilson

CONCLUSION

It is the opinion of this office that (1) soil and water conservation districts, organized under the provisions of Chapter 278, RSMo, are not private corporations, but are public, political subdivisions of the state; and (2) Section 278.145, RSMo 1969, providing for aid to soil and water conservation districts from cities and counties, does not violate Article VI, Section 25, Missouri Constitution.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert M. Sommers.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

May 30, 1975

OPINION LETTER NO. 125

Dr. Arthur L. Mallory
Commissioner of Education
Department of Elementary and
Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This is in answer to your request for our review of the annual revision of the State Plan for Vocational Education in Missouri, said revision being necessary under the provisions of the Vocational Education Act of 1963, Public Law 88-210, as amended in 1968 by Public Law 90-576, in 1972 by Public Law 92-318, and in 1974 by Public Law 93-380 (20 U.S.C. §§ 1241 et seq.).

It is the opinion of this office that the Missouri State Board of Education is the state board which has the authority under state law to submit the State Plan and to administer and supervise the administration of the vocational educational programs described therein as the sole agency responsible for the administration of the Plan. See 20 U.S.C. § 1248(8) [Public Law 92-318, Title II, Section 202, 1972], § 1244(b)(1)(B) [Public Law 92-318, Title II, Section 209, 1972], § 1263(a)(1) [Public Law 90-576, Title I, Section 101(b), 1968], 45 CFR 401.6(b)(2), and Sections 178.420 to 178.580, RSMo 1969. All Plan provisions with respect to the use of funds under the Act can be carried out by the state.

Therefore, in conjunction with this letter opinion which constitutes our official certification of the application, we have completed the required certification form.

Yours very truly,

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

May 27, 1975

OPINION LETTER NO. 126

Honorable Kenneth J. Rothman
Honorable James P. Mulvaney
Honorable Wayne Goode
Members of the General Assembly
c/o House Post Office
Jefferson City, Missouri 65101

Gentlemen:

This opinion is in response to your question asking:

"Whether under Chapter 135 RSMo. 1973, Supp. the Department of Revenue can require a person to refund part of tax credit allowed plus charge interest and a penalty due to the fact that the property is held in joint names with a person other than the claimant, even though the claimant paid all of the property taxes on the property, and the other person or persons names which appear on record title are only for purposes of estate planning and to avoid probate, and the claimant contributed the entire amount toward the purchase of, or acquisition of the property, while the other person or persons, contributed nothing."

You also state:

"The Department of Revenue, in some instances, allowed a tax credit on the full amount of property taxes paid, but then in a recheck has found that some cases involve property held in some form of joint ownership with the claimant and a person or persons other than the claimant. The Department then demanded a refund to the

Honorable Kenneth J. Rothman
Honorable James P. Mulvaney
Honorable Wayne Goode

State by the claimant on part of the tax credit allowed and already paid to the claimant. Further the Department has assessed an interest charge and a penalty on these persons who were paid the tax credit, in this type of situation."

It is our understanding that the position taken by the Department of Revenue is that if the property upon which the taxes were paid is owned jointly by the claimant and someone other than a spouse, it is the policy of the Department of Revenue to allow the claimant credit only for that portion of the taxes which reflects his percentage of ownership in the property.

Our review of the provisions of the "circuit breaker" law lead us to the conclusion that the position of the Department of Revenue, as stated, is legally sound.

We have avoided a detailed analysis of our views in view of the urgency of your request and so that the legislature may be promptly advised that amendments to the law might be considered if such conclusion does not reflect the legislative intent.

Yours very truly,



JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

June 19, 1975

OPINION LETTER NO. 127

Mr. Lawrence L. Graham, Director
Department of Social Services
Broadway State Office Building
Jefferson City, Missouri 65101

Dear Mr. Graham:

This is in reply to your request for an opinion of this office concerning the statutory construction of Section 216.224 (1), RSMo Supp. 1973. Section 216.224(1) reads as follows:

"The director of the department of corrections may extend the limits of the place of confinement of an inmate who, he has reasonable cause to believe, will honor his trust, by authorizing him, under prescribed conditions, to visit specifically designated places within the state for a period not to exceed thirty days per year and to return to the same or another designated institution. The authority herein conferred may be exercised to permit the inmate to visit a relative who is ill, to attend the funeral of a relative, to obtain medical services not otherwise available, to contact prospective employers and to participate in approved rehabilitation programs. If the inmate is enrolled in a work release program the thirty day per annum limitation shall not apply."

Your specific question in regard to the foregoing statute is whether the director of the Division of Corrections can delegate his authority to grant furloughs pursuant to Section 216.224 to the warden or superintendent of the various institutions within

Mr. Lawrence L. Graham

the division. Our research leads us to the conclusion that the director of the Division of Corrections may not delegate his authority to grant furloughs under the statute to the warden or superintendent of the institutions within the division.

The language of Section 216.224(1) states that the director of the Department of Corrections may extend the limits of the place of confinement of an inmate who he (the director) has reasonable cause to believe will honor his trust. An act which requires the exercise of judgment in its performance on the part of a state official or an act which a public officer may or may not do in the exercise of his official discretion is not ministerial but rather discretionary. In the case of State on inf. Gentry v. Toliver, 287 S.W. 312 (Mo. Banc 1926), the Missouri Supreme Court specifically held:

" . . . An act which an officer may do or may not do, in the exercise of his official discretion; cannot be considered a ministerial act." Id. at 316

See State ex rel. Folkers v. Welsch, 124 S.W.2d 636 (St.L.Ct.App. 1939); State ex rel. Funk v. Turner, 42 S.W.2d 594 (Mo. 1931). In other words, if the public officer has an alternative (to do the act or not to do it) or a choice in the matter, then the act is a discretionary one. There is no doubt that under the provisions of Section 216.224(1) the director of the Division of Corrections is given the discretion to furlough inmates if he desires to do so. In this light there can be no question but that the authority of the director to furlough inmates is a discretionary matter.

Once having established that the furlough of inmates is a discretionary action of the director under the statute, the question becomes one of whether or not the director may delegate his authority pursuant to Section 216.224 to the warden or superintendent of the institutions under his control. It is well-settled law that state officers may not delegate the exercise of their discretion. Discretion that is within the power granted to a particular state official cannot be controlled by other state officers. See State ex rel. Thrash v. Lamb, 141 S.W. 665 (Mo. Banc 1911). In the case of State ex rel. Skrainka Const. Co. v. Reber, 126 S.W. 397 (Mo. Banc 1910), the Missouri Supreme Court specifically held:

" . . . An officer to whom a discretion is intrusted by law cannot delegate to another the exercise of that discretion, . . ."
Id. at 399

Mr. Lawrence L. Graham

See State ex rel. Griffin v. Smith, 258 S.W.2d 590 (Mo. Banc 1953); Powers v. Kansas City, 224 Mo.App. 70, 18 S.W.2d 545 (K.C.Mo.App. 1929); Sheehan v. Gleeson, 46 Mo. 100 (1870). In light of the controlling case law in this state, it is clear that the director of the Division of Corrections may not delegate to the warden or superintendent of the institutions under his control the discretion vested in him by the statute to determine whether or not an inmate should be granted a furlough. Of course, the director may seek the advise and counsel of the warden and superintendents in determining which inmates should be granted furloughs, but the ultimate decision under the statute rests with the director and cannot be delegated to his subordinates.

In light of the above conclusion, I do not believe that it is necessary to specifically answer the additional question presented in your request concerning the use of the director's name stamp at each institution.

Very truly yours,

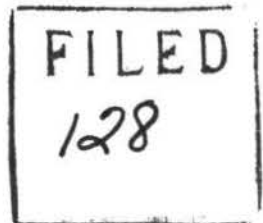
A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

May 7, 1975

OPINION LETTER NO. 128

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Elementary and
Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Commissioner Mallory:

In accordance with your request of May 1, 1975, we have reviewed the Missouri State Board of Education's "State Plan for Vocational Rehabilitation Services Under Section 101 of the Rehabilitation Act of 1973, as amended (by the Rehabilitation Act Amendments of 1974)." Our review has taken into consideration the Rehabilitation Act of 1973, as amended, 29 U.S.C. Section 701, et seq., and the regulations implementing the Rehabilitation Act of 1973, as amended, 45 C.F.R. Section 401.1, et seq. (revised December 5, 1975). In addition, we have taken into consideration Article III, Section 38(a), Missouri Constitution, Chapter 161, RSMo 1969, and Section 178.610, RSMo 1969.

Based on the foregoing, we hereby certify that the Missouri State Board of Education is the state agency administering or supervising the administration of education and vocational education in the State of Missouri, and is, therefore, qualified to be "a sole state agency to administer the state plan, or to supervise its administration in a political subdivision of the state by a sole local agency. . . ." in accordance with 45 C.F.R. Section 401.6.

Very truly yours,

JOHN C. DANFORTH
Attorney General

May 22, 1975

OPINION LETTER NO. 129
Answer by Letter - Klaffenbach

Harold P. Robb, M.D., Director
Department of Mental Health
Post Office Box 687
Jefferson City, Missouri 65101



Dear Dr. Robb:

This letter is in response to your question asking:

"Can the Department of Mental Health legally allow the St. Francois County Court to utilize one of the buildings on the premises of the Farmington State Hospital, Farmington, Missouri as a Juvenile Detention Center?"

You also state that:

"The Court of St. Francois County has recently gone second class and is required by statute to provide for a Juvenile Detention Facility separate and apart from their ordinary detention facility. The [County Court] Judge has requested that some arrangements be made so that they might use one of the buildings at Farmington State Hospital as such a facility until such time as the county can construct a facility for Juvenile Detention."

We find no statutory authority which would allow the Department of Mental Health to permit the county to use the buildings

Harold P. Robb, M.D.

for county purposes regardless of whether or not the Department or the county assumes the duty of maintaining the property. We believe that express or necessarily implied authority must exist in order to effect such a transfer of occupancy.

Very truly yours,

JOHN C. DANFORTH
Attorney General

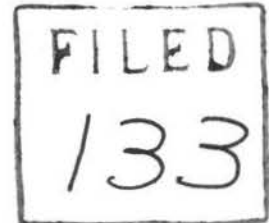
POLICE:
CITY POLICE:
STATE AUDITOR:
STATE AGENCIES:
CITIES, TOWNS & VILLAGES:

The metropolitan police systems in St. Louis and Kansas City are "state agencies" within the meaning of Section 29.200, RSMo.

OPINION NO. 133

May 30, 1975

Honorable George W. Lehr
State Auditor
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Lehr:

The following opinion is in response to the question you have posed as follows:

"Are the Boards of Police Commissioners and the Police Departments in St. Louis and Kansas City state agencies within the meaning of Section 29.200, RSMo?"

Section 29.200, RSMo, states as follows:

"The state auditor shall postaudit the accounts of all state agencies and audit the treasury at least once annually. Once every two years, and when he deems it necessary, proper or expedient, the state auditor shall examine and postaudit the accounts of all appointive officers of the state and of institutions supported in whole or in part by the state. He shall audit any executive department or agency of the state upon the request of the governor."

We have found no cases that construe this provision in relation to the police departments of St. Louis and Kansas City.

For the purposes of answering this question, we perceive no significant difference between the statutes establishing a Board of Police Commissioners in St. Louis (Sections 84.010 to 84.340, RSMo) and Kansas City (Sections 84.350 to 84.860, RSMo). Sections 84.010 to 84.350, RSMo, are still applicable to the City of St. Louis even though the official census of 1970 listed a population in St. Louis less than 700,000. State ex rel. McNeal v. Roach, No. 58884 (Mo.Banc March 28, 1975), page 10.

Honorable George W. Lehr

Both sets of statutes: provide for a board of police commissioners consisting of four commissioners appointed by the Governor with the advice and consent of the Senate, in addition to mayor (Sections 84.020 to 84.080--St. Louis, Sections 84.350 to 84.410--Kansas City); authorize the boards to establish a permanent police force to assist in performing the duties imposed upon them (Section 84.100--St. Louis, Section 84.470--Kansas City); vest the boards with the exclusive management and control of their respective police departments (Section 84.010--St. Louis, Section 84.460--Kansas City); and state that the respective boards shall prepare a budget estimate annually which shall be submitted to the legislative body of the municipality which, in turn, is required to appropriate the amount budgeted (Section 84.210--St. Louis, Section 84.730--Kansas City).

A system of metropolitan police, under the control of a board of police commissioners appointed by the Governor and financed by the municipality, has existed in St. Louis since 1861 and Kansas City since 1874. American Fire Alarm Co. v. Board of Police Com'rs of Kansas City, 227 S.W. 114, 116 (Mo. 1920).

In the case of State ex rel. Hawes v. Mason, 54 S.W. 524 (Mo. Banc 1899), the Supreme Court of Missouri expounded on the public policy behind the establishment of metropolitan police systems of this nature. It stated at pages 528-529:

" . . . 1. The fundamental principles underlying the acts of 1861 and 1899 creating boards of police commissioners for the city of St. Louis are the same, and the constitutionality of such legislation has stood the test of the most critical judicial examination and review. Laws like these, and those of other states, providing a metropolitan police system for large cities, are based upon the elementary proposition that the protection of life, liberty, and property, and the preservation of the public peace and order, in every part, division, and subdivision of the state, is a governmental duty, which devolves upon the state, and not upon its municipalities, any further than the state, in its sovereignty, may see fit to impose upon or delegate it to the municipalities. The right to establish the peace and order of society is an inherent attribute of government, whatever its form, and is co-extensive with the geographical limits thereof, and touching every part of

Honorable George W. Lehr

its territory. From this duty, existing in the very nature of the state government, flows the corresponding power to impose upon municipalities of its own creation a police force of its own creation, and to compel its support out of the municipal funds. Such is the conceded doctrine by the most learned of our writers upon constitutional law, and such the consensus of judicial decision throughout the United States. Wherever the legislature has the right to assume control of a municipal office, it has likewise the right to compel the city to provide for defraying the expenses of such office; and while it is sometimes difficult to draw the line, and distinguish whether a given office is of a public or state character, or is simply one to subserve a municipal function, it is almost universally conceded that police boards and metropolitan police forces are state officers, and fall clearly within legislative control. . . ."

The Mason case dealt with the St. Louis Police Board but its view that the Board performs a state (as versus municipal) function has been applied to Kansas City also. State ex rel. Goodnow v. Police Com'rs of Kansas City, 71 S.W. 215, 220 (Mo.Banc 1902).

Furthermore, in the case of American Fire Alarm Co. v. Board of Police Com'rs of Kansas City, supra, the Supreme Court of Missouri considered the tort liability of the Kansas City Board of Police Commissioners. In determining that a defense of immunity to the action for being a department of municipal government was inapplicable, the court stated at page 117:

"The pertinency of the foregoing observations and authorities to the point in hand in the present case consists in their demonstration that the board of police and the police system of Kansas City do not compose a department of the municipal government, . . ."

To the same effect is the case of State ex rel. Field v. Smith, 49 S.W.2d 74 (Mo.Banc 1932), in which the court stated at page 75:

". . . The system so set up in and for Kansas City is a department of the state government, and not of the municipal government of that city. . . ."

Honorable Goerge W. Lehr

and at page 76:

"As stated, the metropolitan police system of Kansas City is a state agency, a department of the state government, created or attempted to be created by the Legislature."

Also, State ex rel. Spink v. Kemp, 283 S.W.2d 502 (Mo.Banc 1955), where the Missouri Supreme Court en banc stated at page 514:

"[2,3] The statutes creating the board of police commissioners of Kansas City and the police department thereof, defining their respective duties, powers and responsibilities, and providing for their maintenance, §§ 84.350-84.860, expressly retain jurisdiction of the Kansas City police system as an agency of the state. . . ."

Of interest also is the case of Pearson v. Kansas City, 55 S.W.2d 485 (Mo. 1932), involving allegations of tort liability resting with the municipality. Kansas City raised, as a defense, that the police board, which was in charge of the facility in question, was a state agency for whose acts the city was not liable, page 487. The court, however, determined it unnecessary to consider this point.

In addition, this office has previously held that the Kansas City Board of Police Commissioners constitutes a state agency. Opinion No. 30, Fox, 1960.

From the foregoing, it is clear that the police systems in St. Louis and Kansas City have been considered as state agencies.

There remains a possible consideration of whether the metropolitan police systems were intended to be included within the provisions of Section 29.200, RSMo. As mentioned before, the functioning of the metropolitan police systems is funded from municipal sources (and any federal sources). Therefore, conceivably, there could be an argument that the State Auditor would have no interest since no state funds are involved.

It is our view that any such argument is without merit. Initially, Section 29.200 makes no distinction among state agencies by its terms.

Honorable George W. Lehr

Furthermore, as stated in Spink, supra, at page 522:

"[25-28] The proper maintenance of an adequate police system in Kansas City is a matter of state concern. State ex rel. Reynolds v. Jost, 265 Mo. 51, 67, 175 S.W. 591, 593. See also Van Gilder v. City of Madison, 222 Wis. 58, 267 N.W. 25, 268 N.W. 108, 105 A.L.R. 244, and annotation at page 259. The fiscal affairs of a municipality such as Kansas City are subject to such legislative control as is necessary to the proper enforcement of matters of general state concern. 62 C.J.S., Municipal Corporations, § 193, p. 352. . . ."

The audit of the accounts of any public agency is one aspect of the supervision and accountability established in any governmental system. It would be consistent with the state level general supervision of the metropolitan police systems by the General Assembly to require a state level audit by the State Auditor.

Therefore, it is our view that the metropolitan police systems in St. Louis and Kansas City are "state agencies" within the meaning of Section 29.200, RSMo.

CONCLUSION

It is the opinion of this office that the metropolitan police systems in St. Louis and Kansas City are "state agencies" within the meaning of Section 29.200, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Andrew Rothschild.

Yours very truly,



JOHN C. DANFORTH
Attorney General

July 1, 1975

OPINION LETTER NO. 134
Answer by letter-Klaffenbach



Honorable Earl L. Schlef
Representative, District 60
1672 Maldon Lane
Dellwood, Missouri 63136

Dear Representative Schlef:

This letter is in response to your request for an opinion from this office as follows:

"In a Fourth Class City with an 8-man Board of Aldermen with one alderman absent, when the vote on passage of an ordinance rezoning property from a residential zoning category to a commercial category is three ayes, three nays, and one abstention and the Mayor votes aye to break the tie, does the ordinance pass?"

You state that your question involves a fourth class city with an eight man board of aldermen.

Section 79.120, RSMo, provides in pertinent part as follows:

"The mayor shall have a seat in and preside over the board of aldermen, but shall not vote on any question except in case of a tie, . . ."

Section 79.130, RSMo, provides as follows:

"The style of the ordinances of the city shall be: 'Be it ordained by the board of aldermen of the city of, as follows:' No ordinance shall be passed except by bill, and no bill shall become an ordinance unless on its final passage a majority of the members elected to the

Honorable Earl L. Schlef

board of aldermen shall vote for it, and the ayes and nays be entered on the journal; and all bills shall be read three times before their passage. No ordinance shall be revived or reenacted by mere reference to the title thereof, but the same shall be set forth at length, as if it were an original ordinance. No bill shall become an ordinance until it shall have been signed by the mayor or person exercising the duties of the mayor's office, or shall have been passed over the mayor's veto, as herein provided." (Emphasis added)

It is our view that in reaching a decision on this question it is not necessary to interpret the court decisions relating to cases where an additional vote is necessary to break a tie to pass a measure. For those interested in such cases, however, we cite Northwestern Bell Telephone Company v. Board of Commissioners of the City of Fargo, 211 N.W.2d 399, 402 (N.D. 1973) and Mullins v. Eveland, 234 S.W.2d 639, 641 (K.C.Mo.App. 1950).

We reach this conclusion for the following reason. Section 79.130, RSMo, requires a majority vote of the members elected to the board of aldermen to enact an ordinance. A majority of those elected in this case would be five members voting aye. Since only three members have voted aye, the vote of the abstaining member, if counted as aye, would not suffice to pass the measure. If the abstaining member was so counted, there would be no tie and the mayor would not be entitled to vote. If the abstaining member was not so counted, the vote of the mayor, even if proper, would not be sufficient to pass the measure.

There is no authority that we are aware of in these premises which would permit the abstaining member to be counted as an aye vote and also permit an aye vote by the mayor to be counted. For these reasons, an analysis of the cases serves no purpose in this instance since the measure did not pass because there were insufficient votes for passage no matter which legal theory is followed.

We are aware of the holding of the St. Louis Court of Appeals in the case of Krug v. Village of Mary Ridge, 271 S.W.2d 867 (St.L. Ct.App. 1954), in which case the court held that an ordinance was void when the record showed that all five trustees were present at the meeting at which the ordinance was allegedly passed but only

Honorable Earl L. Schlef

four aye votes were listed as being cast for the ordinance, but we do not base our holding on your question on the reasoning found in such case.

Yours very truly,

JOHN C. DANFORTH
Attorney General

PENSIONS:
RETIREMENT:
CLEAN WATER COMMISSION:
DEPARTMENT OF NATURAL RESOURCES:
STATE EMPLOYEES' RETIREMENT SYSTEM:

Under Section 104.380.1(1), RSMo Supp. 1973, the Director of the Department of Natural Resources, and not the Clean Water Commission, is the "head of the department"

for purposes of retention of a director of staff to the Commission beyond normal retirement age.

OPINION NO. 137

May 16, 1975

Mr. James L. Wilson, Director
Department of Natural Resources
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Mr. Wilson:

This is in response to your request for an official opinion of this office concerning the question whether the Director of the Department of Natural Resources or the Clean Water Commission is the head of the department for purposes of retention of a director of staff to the Commission beyond normal retirement age under Section 104.380.1(1), RSMo Supp. 1973.

Section 104.380.1(1) provides:

"1. Each member shall retire at the end of the month during which such member shall reach normal retirement age with a normal annuity, except that

(1) Any employee, upon written request, with the written approval of his department head filed with the board in advance of the retirement date, may be retained for successive periods of one year until age seventy, when retirement shall be compulsory;"

The position of director of staff in the Department of Natural Resources is provided for in Section 10.2, "Omnibus State Reorganization Act of 1974," C.C.S.H.C.S.S.C.S.S.B. No. 1, First Extraordinary Session, 77th General Assembly (hereinafter referred to as S.B. 1), and any person holding said position is both an employee and a member within the meaning of the Missouri State Employees' Retirement System. Section 104.310(15) and (20), RSMo Supp. 1973. Also, normal retirement age is sixty-five. Section 104.310(22).

Mr. James L. Wilson

Department is defined in the retirement law as:

" . . . any department, institution, board, commission, officer, court or any agency of the state government receiving state appropriations including allocated funds from the federal government and having power to certify payrolls authorizing payments of salary or wages against appropriations made by the federal government or the state legislature from any state fund, or against trusts or allocated funds held by the state treasurer;" Section 104.310(11)

There presently are two appropriations concerning the Clean Water Program, Sections 4.630 and 4.635, C.C.S.H.B. No. 1004, Second Regular Session, 77th General Assembly, which both read in part:

"To the Department of Natural Resources For the Clean Water Commission"

Furthermore, C.C.S.H.B. No. 1004 begins with:

"There is appropriated out of the State Treasury, chargeable to the fund for the agency or its legal successor for the purpose designated, for the period beginning July 1, 1974 and ending June 30, 1975, as follows:"

This language merely recognizes that the Reorganization Act may affect certain appropriations. In this instance, the appropriations for the Clean Water Program appropriately reflect that the Clean Water Commission was transferred to the Department of Natural Resources by a "type II transfer" (Section 10.3, S.B. 1), which is defined as:

"Under this act a type II transfer is the transfer of a department, division, agency, board, commission, unit, or program to the new department in its entirety with all the powers, duties, functions, records, personnel, property, matters pending, and all other pertinent vestiges retained by the department, division, agency, board, commission, unit or program transferred subject to supervision by the director of the department. Supervision by the director of the department under a type II transfer shall include,

Mr. James L. Wilson

but shall be limited to: budgeting and reporting under subdivisions (4) and (5) of subsection 6 of this section; to abolishment of positions, other than division, agency, unit or program heads specified by statute; to the employment and discharge of division directors; to the employment and discharge of employees, except as otherwise provided in this act; to allocation and reallocation of duties, functions and personnel; and to supervision of equipment utilization, space utilization, procurement of supplies and services to promote economic and efficient administration and operation of the department and of each agency within the department. Supervision by the director of the department under a type II transfer shall not extend to substantive matters relative to policies, regulative functions or appeals from decisions of the transferred department, division, agency, board, commission, unit or program, unless specifically provided by law. The method of appointment under type II transfer will remain unchanged unless specifically altered by this act or later acts." Section 1.7(1)(b), S.B. 1

It is apparent that the purpose of a type II transfer is to remove from policy making commissions, such as the Clean Water Commission, the burden of administrative problems, such as fiscal matters, so that the commissions will only have to concentrate their time and efforts on their real reason for being, that is, setting fundamental policy, such as clean water regulations. This is consistent with Section 10.1 of S.B. 1 concerning the requirement that the Director of the Department of Natural Resources "faithfully cause to be executed all policies established" by the Clean Water Commission. See also, Attorney General Opinion No. 235, June 18, 1974, Bond, where this same discussion is made concerning the position of director of staff.

Accordingly, it is our opinion that pursuant to S.B. 1 the Director of the Department of Natural Resources is, under the definition of department in Section 104.310(11), the department head who has the authority to approve extension beyond normal retirement age under Section 104.380.

That is so regardless of the authority of the Commission to give its approval, which is a continuing power by virtue of power of removal, to any appointment of director of staff. This power

Mr. James L. Wilson

of approval and removal has no relationship to extension beyond retirement under Section 104.380.

CONCLUSION

It is the opinion of this office that under Section 104.380.1 (1), RSMo Supp. 1973, the Director of the Department of Natural Resources, and not the Clean Water Commission, is the "head of the department" for purposes of retention of a director of staff to the Commission beyond normal retirement age.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 235
6-18-74, Bond



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

June 30, 1975

OPINION LETTER NO. 139

Honorable James P. Anderton
Prosecuting Attorney
Hickory County Courthouse
Mermitage, Missouri 65668

Dear Mr. Anderton:

This is in response to your request for an opinion from this office as follows:

"Construction of R. S. Mo. 12.080 and 12.100. Specifically, Statute 12.100 provides that the County Court shall allow to the school districts and for roads an amount based upon their respective levies equal to that which would ordinarily be allowed to them out of the taxes from property owned by the United States if the property were privately owned before using any of the monies for defraying any expenses of the county. This statute's wording provides for expenditures by the County Court for property owned by the United States. Would this statute require the County Court to pay a proportion to the school districts based on this statute for property not owned by the federal government, i.e. the boat docks and marinas on the lake which are already on the county tax rolls, both for the school districts and for roads, since they are not owned by the federal government or would those funds received from the boat docks be allowed to be spent by the County Courts to defray other expenses as provided in 12.080 and 12.100? The statutes specifically provide for property owned by the United States to be assessed in this way as

Honorable James P. Anderton

if it were privately owned. In the present case, the boat docks are privately owned and they are already taxed. Does the fee, received by the Corps of Engineers of which 75% is returned to the county, have to be subjected to the levy of the road district and school district?

"At present the County Court of Hickory County, Missouri is receiving funds from the federal government through the Flood Control Act. Included in these funds are rental fees or use fees for privately owned boat docks and marinas on the lake. These boat docks and marinas are not owned by the federal government, but do pay a fee to the government for their presence on the lake. At present the County Court has taken the position that since they are privately owned and not federally owned as the Statute 12.100 refers to that the fees from these boat docks are not affected by Statute 12.100 and therefore, the County can use those fees without applying a levy of the schools and the road districts against them."

We are informed by the Corps of Engineers that payments to Hickory County under the Flood Control Act are derived entirely from leases to land and that no payments are made to the county out of money received as rental fees or use fees or concession fees for privately owned boat docks and marinas.

Since all the moneys received are derived from leases of land, it is our view that the opinion request is answered by Opinion Letter No. 107 rendered April 20, 1972, to Floyd E. Lawson, which is enclosed.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. Ltr. No. 107, 4-20-72, Lawson
Op. No. 93, 3-1-56, Wallace
Op. No. 179, 8-16-65, Babbit
Op. No. 77, 2-4-69, Bergbauer
Op. No. 182, 5-5-71, Eads



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

May 29, 1975

OPINION LETTER NO. 140

Honorable W. Swain Perkins
Prosecuting Attorney
Oregon County
Box 304
Alton, Missouri 65606

Dear Mr. Perkins:

This opinion is in response to your request regarding:

"Whether county court is an employer, thereby making it subject to the Workmen's Compensation Laws of the State of Missouri for all county officials and employees?"

You have stated the request pertains to the Oregon County Court and that Oregon County has more than five officials and employees. A check by telephone has provided information that Oregon County has nineteen nonelective employees. It was necessary to determine whether or not Oregon County has more than five employees, not counting elected county officials, except the sheriff, as it is the opinion of this office that elected county officials, except the sheriff, are not employees of the county for the purposes of the Workmen's Compensation Act. Copy of Opinion Letter No. 253 of October 31, 1974, on this point is enclosed.

We concur in your statement that a county is an employer under Section 287.030(2), Senate Bill No. 417, 77th General Assembly; and that, under Section 287.050, Senate Bill No. 417, 77th General Assembly, any employer who has more than five employees regularly employed is a major employer and is not excluded from the operation of the Workmen's Compensation Law. A "minor employer" (an employer who has five or less employees regularly employed), not determined to be engaged in an occupation hazardous to employees, and certain employments of farm labor and domestic servants are exempted from the operation of the Workmen's Compensation Law.

Honorable W. Swain Perkins

In 1973, Section 287.021, RSMo, was enacted requiring each county to provide workmen's compensation insurance to cover the sheriff and deputy sheriffs in its county. Section 287.090 of Senate Bill No. 417, 77th General Assembly, brought employments by a county, municipal corporation, township, school or road, drainage, swamp and levee district, or school board, board of education, or any other political subdivision within the Workmen's Compensation Act by removing these employments from those exempted from the operation of the Act.

On the basis of the information furnished, as indicated above, it is the opinion of this office that Oregon County is an employer and that nonelective employees of Oregon County and the sheriff are employees of the county for the purposes of the Workmen's Compensation Act. Elective officials, except the sheriff, are not employees of the county for that purpose.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. Ltr. No. 253
10-31-74, Seier

COUNTIES:
OFFICERS:
COUNTY JUDGES:
COUNTY OFFICERS:
CONFLICT OF INTEREST:

The presiding judge of the county court of Ripley County cannot be employed and paid compensation for his services to supervise the courthouse renovation project.

OPINION NO. 141

July 3, 1975

Honorable James R. Hall
Prosecuting Attorney
Ripley County
The Hunt Building
204 Washington
Doniphan, Missouri 63935

Dear Mr. Hall:

This is in response to your request for an opinion from this office as follows:

"May the presiding judge of the county court of a third class county be employed as 'job superintendent' of a courthouse renovation project, and receive compensation for his services in addition to his compensation as county judge?

"Ripley County, Missouri has applied for a grant of \$240,000.00 from the United States under Title 10 of the Economic Development Act, to be matched by \$60,000.00 in Ripley County revenues. The total of \$300,000.00 will be used to renovate the Ripley County Courthouse at Doniphan.

"By the terms of the grant, several conditions must be adhered to, including and necessitating the employment of a 'job superintendent' who will have overall on-site supervision of the project, and who will be responsible, through the architect, for compliance with federal requirements imposed by terms of the grant.

"The federal agencies involved have indicated a preference for the position of 'job

Honorable James R. Hall

superintendent' to be filled by the presiding judge of the county court. The time required by the position would require that the presiding judge be paid reasonable compensation for his services, over and above his compensation as county judge.

"It is anticipated that payments would be subject to approval by the Ripley County Court, and the Economic Development Agency."

It is our view that the answer to your question is found in Section 49.140, RSMo, which provides as follows:

"No judge of any county court shall, directly or indirectly, become a party to any contract to which the county is a party, or act as a road or bridge commissioner, either general or special, or keeper of any poor person."

This statutory provision was considered in the case of Nodaway County v. Kidder, 129 S.W.2d 857 (Mo. 1939), in an action by Nodaway County to recover moneys paid by Nodaway County to the presiding judge of the county court for services he had rendered as an employee of the county under an agreement with the county court in part to save the county from hiring a highway engineer.

The court stated the alleged agreement between the presiding judge of the county court and the county court was void under the express terms of the statute. As an additional grounds for holding the contract void, the court stated as follows, 1.c. 861:

"Appellant's alleged contract was also void as against public policy regardless of the statute. A member of an official board cannot contract with the body of which he is a member. The election by a Board of Commissioners of one of its own members to the office of clerk and agreement to pay him a salary was held void as against public policy. Town of Carolina Beach v. Mintz, 212 N.C. 578, 194 S.E. 309; 46 C.J. 1037 Sec. 308."

Under the express provision of Section 49.140, RSMo, a member of the county court is prohibited from entering into any contract with the county in which he is interested, directly or indirectly, and this would include any employment for compensation.

Honorable James R. Hall

CONCLUSION

It is the opinion of this office that the presiding judge of the county court of Ripley County cannot be employed and paid compensation for his services to supervise the courthouse renovation project.

The foregoing opinion, which I hereby approved, was prepared by my assistant, Moody Mansur.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

STATE AGENCY:
STATE AUDITOR:
BI-STATE DEVELOPMENT AGENCY:
KANSAS CITY AREA TRANSPORTATION AUTHORITY:

The Bi-State Development Agency and the Kansas City Area Transportation Authority are not "state agencies"

within the meaning of the term as used in Section 29.200, RSMo, and the State Auditor is not authorized to postaudit their accounts.

OPINION NO. 142

July 24, 1975

Honorable George W. Lehr
State Auditor
State Auditor's Office
State Capitol Building
Jefferson City, Missouri 65101

FILED
142

Dear Mr. Lehr:

This opinion is in response to your question as follows:

"Are the Bi-State Development Agency, Section 70.370, RSMo, and the Kansas City Area Transportation Authority, Section 238.010, RSMo, state agencies within the meaning of Section 29.200, RSMo?"

Section 29.200, RSMo, states:

"The state auditor shall postaudit the accounts of all state agencies and audit the treasury at least once annually. Once every two years, and when he deems it necessary, proper or expedient, the state auditor shall examine and postaudit the accounts of all appointive officers of the state and of institutions supported in whole or in part by the state. He shall audit any executive department or agency of the state upon the request of the governor."

The Bi-State Development Agency of the Missouri-Illinois Metropolitan District (Bi-State) was created in 1949 by compact authorized by the legislatures of Missouri and Illinois with the approval of the United States Congress. Section 70.370, RSMo, and ch. 127, § 631-1, Ill.Rev.Stat.

Honorable George W. Lehr

Article III of the Compact contained in Section 70.370, RSMo, states, in part:

"ARTICLE III

There is created 'The Bi-State Development Agency of the Missouri-Illinois Metropolitan District' (herein referred to as 'The Bi-State Agency') which shall be a body corporate and politic. . . ."

The Kansas City Area Transportation Authority of the Kansas City Area Transportation District (KCATA) was created in 1965 by compact authorized by the legislatures of Missouri and Kansas with the approval of the United States Congress. Section 238.010, RSMo, and Sections 12-2524, et seq., K.S.A.

Article III of the Compact contained in Section 238.010, RSMo, states, in part:

"ARTICLE III

There is created the Kansas City Area Transportation Authority of the Kansas City Area Transportation District (hereinafter referred to as the 'Authority'), which shall be a body corporate and politic and a political subdivision of the States of Missouri and Kansas."

For the purposes of answering this question, we perceive no significant difference in the legal nature of Bi-State and KCATA. We do note, however, that the Compact creating KCATA expressly describes it as a political subdivision of Missouri and Kansas while the Bi-State Compact is silent. As in Kansas City Area Transportation Authority v. Ashley, 478 S.W.2d 323 (Mo. 1972), we find this difference to be insignificant.

The legal status of Bi-State and KCATA is less than clear. The Missouri Supreme Court has held that Bi-State and KCATA are not political subdivisions of the state for the purposes of Supreme Court jurisdiction pursuant to Article V, Section 3, Missouri Constitution. St. Louis County Transit Co. v. The Division of Employment Security of the Department of Labor and Industrial Relations, 456 S.W.2d 334 (Mo. 1970); Kansas City Area Transportation Authority v. Ashley, *supra*. The theory of these cases was that neither Bi-State nor KCATA exercised governmental functions "as would provide for a separate and distinct 'governmental' unit."

Honorable George W. Lehr

At the same time, as noted before, the Compact creating KCATA expressly provides that KCATA is a political subdivision of Missouri and Kansas. Furthermore, in the Transportation Sales Tax Act of 1973, Sections 94.600, et seq., RSMo, the Missouri General Assembly, in a clear reference to Bi-State and KCATA, defined "Interstate Transportation Authority" [Section 94.600(5)] as:

" . . . shall mean any political subdivision created by compact between this state and another state, which is a body corporate and politic and a political subdivision of both contracting states, and which operates a public mass transportation system;"
(Emphasis added)

The United States Court of Appeals for the Eighth Circuit has characterized Bi-State as a "joint or common agency of the States of Missouri and Illinois." Ladue Local Lines, Inc. v. Bi-State Development Agency of the Missouri-Illinois Metropolitan District, 433 F.2d 131, 132 (8th Cir. 1970).

This office has previously held the view that Bi-State was a "public corporation" with power to engage in proprietary functions for the common good." Opinion No. 218, dated December 30, 1964, to State Tax Commission (copy enclosed).

We have contacted the appropriate offices in Illinois and Kansas for their views on this issue. The Illinois Attorney General has informed us that they have informally expressed the view that Bi-State is not an agency or arm of the State of Illinois, but rather it is an "independent organization."

The Illinois Auditor General informed us that his office is not authorized to audit Bi-State directly as a state agency. His office does, however, audit the Illinois Department of Transportation which grants funds to Bi-State.

The Kansas Attorney General has informed us that he has never expressed an opinion on the nature of KCATA.

The Kansas Legislative Post Auditor informed us that his office has never conducted an audit of KCATA as a state agency. It is his view, however, that he would be authorized under Kansas law (K.S.A. 1974 Supp. 46-1114) to conduct such an audit if so directed by the Kansas Legislative Post Audit Committee and if KCATA was a recipient of funds from or through the State of Kansas.

While it may be unresolved as to whether Bi-State and KCATA are "common or joint agencies" of their respective states or are

Honorable George W. Lehr

"instrumentalities" of each state separately, or are of some other nature, we believe that it is safe to conclude that they are not agencies of the State of Missouri for which Section 29.200, RSMo, has application.

The provisions of Sections 70.370 to 70.440, RSMo, and Sections 238.010 to 238.100, RSMo, respectively, clearly provide for the creation of self-sufficient independent entities, vested with specific powers and authority to perform specific functions. Both entities are characterized as bodies corporate and politic. Both entities are authorized to acquire, construct, operate, and maintain transportation systems and/or other specific systems and projects; collect fees and rents; issue bonds; to sue and be sued; contract generally; condemn property; borrow funds; and other specified functions.

In this respect, Bi-State and KCATA appear to be similar in nature to the Environmental Improvement Authority which this office concluded was not an agency of the state, but rather was similar to a "quasi-public corporation" with "precise duties which may be enforced and privileges which may be maintained by suits at law." Opinion No. 225, dated November 19, 1973, to James R. Strong (copy enclosed).

Furthermore, if Section 29.200 were interpreted to permit the State of Missouri to independently audit Bi-State or KCATA, it could conceivably be viewed as undermining the rights and privileges conferred upon the States of Illinois and Kansas, respectively, under the Compacts. See Bush Terminal Co. v. City of New York, 273 N.Y.S. 331, 346 (1934), wherein the Port Authority of New York, created as an instrumentality of New York and New Jersey, was held not subject to property tax of New York City.

Therefore, it is our view that Bi-State and KCATA are not "state agencies" within the meaning of Section 29.200, RSMo. It follows that the State Auditor is not authorized to audit those entities pursuant to this statutory provision.

CONCLUSION

It is the opinion of this office that the Bi-State Development Agency and the Kansas City Area Transportation Authority are not "state agencies" within the meaning of the term as used in Section 29.200, RSMo, and that the State Auditor is not authorized to postaudit their accounts.

Honorable George W. Lehr

The foregoing opinion, which I hereby approve, was prepared by my assistant, Andrew Rothschild.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 218
12-30-64, State Tax Commission

Op. No. 225
11-19-73, Strong



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

July 22, 1975

OPINION LETTER NO. 143

Mr. Daniel M. Buescher
Prosecuting Attorney
Franklin County
County Courthouse
Union, Missouri 63084

Dear Mr. Buescher:

This is in response to your request for an opinion on the following questions:

- "1. Can a County Building Commission and Code established and adopted by the County Court, pursuant to R.S.Mo. 64.170 et seq., be abolished by petition and referendum?
- "2. If so, can such petition be combined with a petition to abolish a County Planning Commission in such a manner as to make the two petitions a single request?
- "3. If a County Building Commission cannot be abolished by referendum, does inclusion of such request in a petition to abolish the County Planning Commission invalidate such petition?
- "4. If so, may the petitions be amended so as to delete the words referring to the Building Commission, or must the petitioners submit a new petition containing

Mr. Daniel M. Buescher

only a request for an election regarding abolition of the Planning Commission?

"5. If the County Building Code and Commission cannot be abolished by referendum, may the County Court nevertheless submit the question to the people in a non-binding referendum pursuant to a petition therefor?

"6. Will the insertion of the words 'or as soon thereafter as possible', in a petition referring to the time requested for the election, after the petition has been signed, invalidate such petition so as to prohibit calling an election pursuant to such petition?"

In answering these questions we note that Franklin County is a second class county.

In answer to your first question, there is no general law or constitutional provision which would generally subject the action of the county court of a second class county to referendum. The provisions of Article III, Section 52(a) of the State Constitution providing for referendum apply only to laws enacted by the State Legislature. The statutory sections relating specifically to building commissions of second class counties, Section 64.170 et seq., do not provide for referendum on the issue of the existence of the county building commission. Therefore, we are of the opinion that the question of the continued existence of a county building commission is not subject to referendum.

In view of the answer to your first question, no answer is required for your second question.

With respect to your third question, you have included a copy of a petition with your opinion request which we assume is similar in form to the other petitions submitted. The petition provides in pertinent part to this opinion request as follows:

"COUNTY COURT OF FRANKLIN COUNTY

UNION, MISSOURI

STATE OF MISSOURI)
) SS
COUNTY OF FRANKLIN)

No. _____

Mr. Daniel M. Buescher

PETITION TO ABOLISH
PLANNING AND ZONING AND BUILDING COMMISSION

TO: Planning and Zoning AND: Presiding Judge of the
 and Building Commission County Court of Franklin
 Franklin County, Missouri County, Union, Missouri

We, the undersigned, being a [sic] registered voters in the County of Franklin, State of Missouri, do herewith petition and request that the Planning and Zoning and Building Commission be abolished and that the matter of its existence be voted upon and placed upon the November, 1974 ballot for referendum: . . ."

Section 64.900 appears to be the only section relating to the abolishment of county planning and zoning. That section provides:

"1. Upon receipt of a petition signed by a number of eligible voters resident in the county equal to five percent of the total vote cast in the county at the next preceding election for governor requesting an election on the question, the county court in any county which has adopted a program of county planning, county zoning or county planning and zoning shall, at a special election called for the purpose or at the next general election, submit to the voters of the county the proposition to terminate the program. The county clerk shall prepare the ballot in substantially the following form:

For the termination of (county planning,
county zoning or county planning and
zoning). ☐

For the continuation of (county planning,
county zoning or county planning and
zoning). ☐

"2. If a majority of those voting on the question vote for the termination of the program, the county court shall declare the program terminated and shall discharge any commission appointed thereunder. Any resolution, ordinance or regulation adopted under the program pursuant to the provisions of sections

Mr. Daniel M. Buescher

64.800 to 64.905 shall be void and of no effect from and after the termination of the program as provided in this section."

That section is not specific as to the content or form for a petition requesting the abolishment of county planning and zoning. From the petition that has been submitted to the county court, it appears that the circulators and the signers of the petition considered that there was one commission, namely; "planning and zoning and building commission." This is particularly indicated by the form in which the petition is addressed to the "planning and zoning and building commission." However, even if abolishment of only one commission may have been intended, it is not at all clear what commission the circulators and signers had in mind. Furthermore, Section 64.900 does not deal with the abolishment of a commission but deals with the abolishment of county planning and zoning. Therefore, we believe the petition is ambiguous on its face and it cannot be deemed to refer to an election on the issue provided for by Section 64.900. Since there is no other issue of that nature which may be submitted by means of a referendum, we believe the petition is void. In reaching this conclusion, we note that there are no Missouri cases directly on point. However, the Massachusetts Supreme Court has held the description of an initiative measure in an initiative petition must be complete enough to convey an intelligible idea of the scope and import of the proposed law and it ought not to be clouded by undue detail nor so abbreviated as not to be readily comprehensible. In re Opinion of the Justices, 171 N.E. 294, 69 ALR 388 (Mass. 1930).

In our opinion, a Missouri court in passing upon a petition for a referendum on county planning and zoning would follow the guidelines set forth by the Massachusetts court for an initiative petition and following such guidelines hold that the petition you have submitted with your opinion request is void.

With respect to your fourth question, we know of no authority which would permit a petition proposing a referendum to be amended after it has been signed.

With respect to your fifth question, we know of no authority which would permit a county court to submit the question of the abolishment of the county building code and commission to the voters in a non-binding election.

With regard to your last question, Section 64.900 provides that the question is to be voted on at the next general election or at a special election called by the county court. Since the

Mr. Daniel M. Buescher

county court has the discretion to determine the time of the election, we believe a provision calling for an election at a particular time is surplusage and has no force or effect. Such language would not void an otherwise valid petition.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

SUNSHINE LAW:
ST. LOUIS CITY:
CITIES, TOWNS & VILLAGES:

Budgetary meetings of the St. Louis Board of Estimate and Apportionment and the St. Louis Board of Education are "public meetings" under Section 610.010, RSMo Supp. 1973, and may not be closed pursuant to Section 610.025, RSMo Supp. 1973.

OPINION NO. 144

August 1, 1975

Honorable James F. Conway
State Senator, District 6
3811 Flora Place
St. Louis, Missouri 63110



Dear Senator Conway:

This opinion is issued in response to your request for an official Attorney General's opinion answering the following question:

"Does the general discussion of personnel as a group, rather than as an individual or specific individuals, when determining budgetary increases or decreases that affect the size of the staff of said public governmental bodies, give cause for the exclusion of the public at such meetings under the language, 'meetings relating to the hiring, firing or promotion of personnel?'"

In setting out the facts which prompted this request, you state:

"Recently, the Board of Estimate and Apportionment of the City of St. Louis and the St. Louis Board of Education, have held closed meetings for purposes of discussing budgetary matters. These public governmental bodies have excluded the public from these meetings, stating that budgetary conditions might require the laying off of personnel subsequently, they could have a closed meeting and votes under Section 610.025, subsection 4."

Honorable James F. Conway

As I am sure you are aware, Chapter 610 of the Revised Statutes of Missouri requires that all meetings of any public governmental body be open to the public.

Section 610.010(2), RSMo Supp. 1973, defines "public governmental body" to include "any . . . board . . . of any . . . school district."

Meetings of the Board of Estimate and Apportionment of the City of St. Louis are also covered by the Act.

The Supreme Court of Missouri recently held that the Board of Estimates and Apportionment:

" . . . constitute a vital part of the government of the city affecting all its people. Hence, its action is of the type which the General Assembly has said by Chapter 610 shall not be taken in secrecy, but shall be open to the public. To hold otherwise would result in these statutes being meaningless and ineffective . . ." Cohen v. Poelker, 520 S.W.2d 50, 52-53 (Mo.Banc 1975).

As a general rule of statutory construction, statutes which introduce some new regulation or ordinance for the public good are to be considered remedial in nature and are to be given a liberal construction. City of St. Louis v. Carpenter, 341 S.W.2d 786 (Mo. 1961). Courts in other jurisdictions having public meeting laws similar to Missouri's have consistently applied a liberal construction to such legislation. Laman v. McCord, 432 S.W.2d 753 (Ark. 1968); Board of Public Instruction of Broward County v. Doran, 224 So.2d 693 (Fla. 1969); Brown v. State, 245 So.2d 41 (Fla. 1971); City of Miami Beach v. Berns, 245 So.2d 38, 40 (Fla. 1971); Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260, 263 (Fla. 1973).

The St. Louis Court of Appeals in B-W Acceptance Corporation v. Benack, 423 S.W.2d 215, 218 (St.L.Ct.App. 1967), stated:

" . . . one of the cardinal principles of construing remedial legislation is that courts are to consider the evil sought to be cured and 'to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for the continuance of

Honorable James F. Conway

the mischief.' Decker v. Deimer, 229 Mo.
296, 129 S.W. 936[4]."

The mischief sought to be remedied by the Sunshine Law is the deliberate exclusion of the public from the decision-making processes of public governmental bodies. See Board of Public Instruction of Broward County v. Doran, supra at 699.

In Cohen v. Poelker, supra at 52, the court stated:

"The several sections of Chapter 610, considered together, speak loudly and clearly for the General Assembly that its intent in enacting the Sunshine Law, so-called was that all meetings of members of public governmental bodies (except those described in § 610.025) at which the peoples' business is considered must be open to the people and not conducted in secrecy, and also that the records of the body and the votes of its members must be open."

Where a statute is to be liberally construed, the exceptions to the operation of that statute should be given a narrow construction. See 73 Am.Jur.2d Statutes § 313 (1974) at 463-464, which states:

". . . ordinarily a strict or narrow construction is applied to statutory exceptions to the operation of laws. . . . These rules are particularly applicable where the statute promotes the public welfare, or where, in general, the law itself is entitled to a liberal construction. . . ."

The General Assembly recognized that in certain specific situations, set forth in Section 610.025, the interest of the public in open meetings is outweighed by other interests. The legislature explicitly set forth the various subjects that may be discussed behind closed doors.

According to your opinion request, the members of the Board of Estimate and Apportionment for the City of St. Louis and the St. Louis Board of Education have maintained that they may close their budgetary meetings pursuant to Section 610.025, subsection 4, RSMo Supp. 1973, which reads as follows:

Honorable James F. Conway

"Any nonjudicial mental health proceedings and proceedings involving physical health, scholastic probation, scholastic expulsion or scholastic graduation, welfare cases, meetings relating to the hiring, firing or promotion of personnel of a public governmental body may be a closed meeting, closed record, or closed vote." (Emphasis added).

In our opinion, meetings of these public governmental bodies for the purpose of discussing budgetary matters affecting personnel as a group, rather than on an individual level, are not authorized to be closed and must, therefore, be open to the public.

Subsection 4, the provision in question here, excludes meetings and proceedings involving personnel matters in which premature publicity could cause unjustified damage to individual reputations. The subsection specifically excludes meetings concerning questions of mental and physical health, welfare matters, situations involving possible disciplinary action or dismissal, and the "hiring, firing or promotion of personnel of a public governmental body."

The Board of Estimate and Apportionment is not involved in the hiring, firing, or promotion of employees on an individual level. Its functions are set out in Article XVI of the Charter of the City of St. Louis. Section 3 of Article XVI provides that this Board shall:

". . . annually submit and recommend to the board of aldermen a bill appropriating the amounts deemed necessary for the use of each department, board and office for the current fiscal year and a bill establishing the city tax rates for the current year; . . ."

Thus, this Board engages in those governmental activities in which the public has the greatest interest--the taxing and spending of the public's money. Admittedly, a low appropriation might require the laying off of personnel. However, this would be an administrative financial decision not involving the merits of an individual employee and not within the meaning of Section 610.025.

The same is true of a purely budgetary meeting of the St. Louis Board of Education. Although, it should be noted that such a body may become involved in individual cases as well and such meetings may properly be closed.

Honorable James F. Conway

CONCLUSION

It is the opinion of this office that budgetary meetings of the St. Louis Board of Estimate and Apportionment and the St. Louis Board of Education are "public meetings" under Section 610.010, RSMo Supp. 1973, and may not be closed pursuant to Section 610.025, RSMo Supp. 1973.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Assistant Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

July 16, 1975

OPINION LETTER NO. 145

Honorable Dan Harmon
Representative, District 140
Post Office Box 465
Noel, Missouri 64854

Dear Representative Harmon:

This is in response to your request for an opinion from this office as follows:

- "A. Sec. 190.015, R.S.Mo. Cumulative Supplement 1973.
Does the description 'Legal Voters' in Line 3, Section 190.015, R.S.Mo. Cumulative Supplement 1973, mean that each petition signer must be a registered voter within the proposed district to be able to affix a valid signature as a legal voter petitioning for the creation of an ambulance district.
- "B. Sec. 190.035, R.S.Mo. Cumulative Supplement 1973.
Does the authority granted to County Courts in Line 17, Section 190.035 R.S. Mo. Cumulative Supplement 1973, to 'set forth the election precincts and designate the polling places therefor', allow the County Court, in a proposed special county-wide ambulance district election, to combine townships and precincts, as they see fit, and reduce the number of election precincts from those used in a general election."

Honorable Dan Harmon

Section 190.015, RSMo Supp. 1973, applicable to counties of less than four hundred thousand population, provides in part:

"Whenever the creation of an ambulance district is desired, a number of legal voters residing in the proposed district equal to ten percent of the vote cast for governor in the proposed district in the next preceding gubernatorial election may file with the county clerk in which the territory or the greater part thereof is situated a petition requesting the creation thereof. In case the proposed district which shall be contiguous is situated in two or more counties, the petition shall be filed in the office of the county clerk of the county in which the greater part of the area is situated, and the judges of the county court of the county shall set the petition for public hearing. The petition shall set forth:

(1) A description of the territory to be embraced in the proposed district;

(2) The names of the municipalities located within the area;

(3) The name of the proposed district;

(4) The population of the district which shall not be less than two thousand inhabitants;

(5) The assessed valuation of the area, which shall not be less than two million five hundred thousand dollars; and

(6) A request that the question be submitted to the electors residing within the limits of the proposed ambulance district whether they will establish an ambulance district under the provisions of sections 190.005 to 190.085 to be known as '_____ Ambulance District' for the purpose of establishing and maintaining an ambulance service."

In your first question, you inquire whether under the above statute a legal voter as used therein means a registered voter within the proposed district.

Honorable Dan Harmon

In Scott v. Kirkpatrick, 513 S.W.2d 442 (Mo.Banc 1974), the question was whether signers of initiative petitions proposing amendments to the state constitution were required to be registered voters; and the court held that persons who are qualified but not registered to vote are not acceptable as signers of such initiative petitions. It is our view that a person who signs a petition as provided for in Section 190.015 for the creation of an ambulance district who is otherwise qualified as a legal voter must be a registered voter within the proposed district.

In answer to your second question, Section 190.035, RSMo Supp. 1973, provides as follows:

"Notice of the election shall be given by publication on three separate days in one or more newspapers having general circulation within the territory, the first of which publications shall be not less than thirty days prior to the date of the election, and by posting notices in ten of the most public places in the territory, and in case no newspaper has a general circulation in the territory, the notices shall be so posted in fifteen of the most public places therein, not less than thirty days prior to the date of the election. Each notice shall state briefly the purpose of the election, setting forth the proposition to be voted upon, form of ballot to be used at the election, a description of the territory, set forth the election precincts, and designate the polling places therefor. The notice shall further state that any district upon its establishment shall have the powers, objects and purposes provided by sections 190.005 to 190.085, and shall have the power to levy a property tax not to exceed fifteen cents on the one hundred dollars valuation."

You inquire whether the authority granted to county courts under the above statute gives the court authority to combine townships and precincts, as they see fit, and reduce the number of election precincts from those used in the general election.

Section 111.751, RSMo, provides as follows:

"The county court may in its discretion, in any special election or for the election

Honorable Dan Harmon

of delegates to a constitutional convention or any constitutional amendment, consolidate two or more election districts or precincts in the county and use necessary judges and clerks in such election districts or precincts."

This statute does not authorize the county court to change the geographical boundaries of the district or precincts, but the court may consolidate two or more as established for this special election.

It is our view that an election to organize an ambulance district is a special election, and the county court would have authority under Section 111.751 to consolidate two or more election districts or precincts in the county and use the necessary judges and clerks in such election districts or precincts.

The courts of this state have held that laws in respect to place of voting are liberally construed to uphold elections where voters have apparent opportunity to vote. State ex rel. Marlowe v. Himmelberger-Harrison Lumber Co., 58 S.W.2d 750 (Mo. 1933).

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

June 25, 1975

OPINION LETTER NO. 146

Honorable Frank Bild
Missouri Senate, District 15
7 Meppen Court
St. Louis, Missouri 63128

Dear Senator Bild:

This letter is in response to your question asking whether it is "legal for an employee of an armored car company to carry a firearm while transporting money and valuables in an area of St. Louis City, St. Louis County and St. Charles County without a watchman's license?"

For the purposes of this opinion we will assume that the employee in question is a uniformed security guard carrying a holstered handgun.

Under Missouri law the statutory control of handguns is confined to Sections 564.610 through 564.660, RSMo; Section 564.610 prohibits a person from carrying a firearm concealed on or about his person and prohibits carrying exposed weapons in certain areas; Section 564.630 sets forth certain permit requirements for the acquisition or transfer of concealable weapons; and, finally, the remaining sections establish firearm identification and bookkeeping requirements and create penalty provisions for enforcement purposes.

It is to be noted that none of the above-cited statutes purport to control the proper carrying of unconcealed firearms except in certain places of assembly and the like.

It is our understanding that certain cities and counties may have enacted ordinances regulating the carrying of exposed firearms. It follows therefore that the carrying of a firearm within the territorial limits of a local jurisdiction would necessarily be subject to the control of the firearm ordinances, if any, enacted within such jurisdiction.

Honorable Frank Bild

For the above reason, it is apparent that to answer the question posed in your opinion request this office would be required to pass solely on the effect of local law. This we decline to do. Instead, it is suggested that you contact the legal officers of the political subdivisions involved.

You should note that in reaching this result, we do not purport to pass on the collateral question of whether an armored car security guard is a "watchman" for local licensing purposes.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

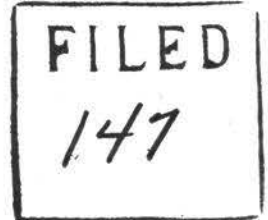
MINORS:
CHILD ABUSE:
CRIMINAL LAW:

The term "reasonable cause to believe" as used in H.B. 578 is the equivalent of the term "suspected" as used in the Federal Register, Volume 39, No. 245, Section 1340.3-3(d)(2)(i).

OPINION NO. 147

June 2, 1975

Honorable Kenneth J. Rothman
State Representative, District 77
State Capitol Building, Room 309
Jefferson City, Missouri 65101



Dear Representative Rothman:

This is in response to your request for an official opinion on the following question:

"Whether the term 'reasonable cause to believe' as used in HB 578 has the same or equivalent meaning as the word 'suspected' as used in the Federal Register, Volume 39, No. 245, Section 1340.3-3(d)(2)(i)?"

In construing the language of H.B. 578 of the 78th General Assembly, we believe that little is to be gained by examining how such terms have been construed in other areas of the law. For instance, in the area of search and seizure, reasonable cause is often equated with probable cause and distinguished from a mere suspicion. However, such construction is based upon the interpretation of a constitutional requirement and is of little use in the present instance. Further, Webster's New World Dictionary, Second College Edition, presents alternative definitions of the word suspect. One definition is to believe with little or no evidence. Another is to think it probable or likely. This latter definition appears to be in line with the term "reasonable cause to believe." Your question, however, cannot be considered in the abstract and we feel that it is necessary to consider the terms in context. Becker v. St. Francois County, 421 S.W.2d 779 (Mo. 1967). In State ex rel. Henderson v. Proctor, 361 S.W.2d 802 (Mo. 1962), it was held that although plain language of a statute may not be capriciously ignored, it is permissible in determining what statutory language really means to consider the

Honorable Kenneth J. Rothman

purpose and policy of the statute, the totality of the enactment, and to construe the statutory language in light of what ". . . ' . . . is below the surface of the words and yet fairly a part of them."'. . ." Id. at 805.

Section 1340.3-3(d)(2)(i) of Volume 39, No. 245 of the Federal Register provides that in order for a state to be eligible for federal aid the state ". . . must provide for the reporting of known or suspected instances of child abuse and neglect. . . ." Section 2.1 of H.B. 578 provides that when anyone of an enumerated list of individuals ". . . has reasonable cause to believe that a child has been or may be subjected to abuse or neglect. . ." it is his duty to file a report with the Division of Family Services.

In examining the other sections of H.B. 578 it should be noted that the term "suspected" is used as frequently as the term "reasonable cause to believe." For instance, subsection 3 of Section 2 of H.B. 578 provides:

"In addition to those persons and officials required to report actual or suspected abuse or neglect, any other person may report in accordance with this act if such person has reasonable cause to believe that a child has been or may be subjected to abuse or neglect or observes a child being subjected to conditions or circumstances which would reasonably result in abuse or neglect."

See also Sections 4.1 and 8.3 of H.B. 578. It appears, therefore, that H.B. 578 uses the terms "suspected" and "reasonable cause to believe" interchangeably. We believe that this is an indication the legislature has intended a construction of "reasonable cause to believe" which is different from that that might be given in the abstract.

We believe that the exact meaning of "reasonable cause to believe" can be inferred from other provisions of H.B. 578. Section 5.2 sets out the requirements for the report which must be filed. Although this section mentions evidence of previous injuries or abuse and the name of the person responsible for the current abuse it is evident that these are not necessary and are to be included only if known. The bill contemplates that a report might be filed without such information and upon nothing more than an examination of the nature of the injuries sustained by the child. In most instances it is quite likely that there is a perfectly rational explanation for the child's injuries other

Honorable Kenneth J. Rothman

than abuse or neglect. H.B. 578, however, does not appear to require any corroboration, and, therefore, it is evident that in using the term "reasonable cause to believe" the legislature did not intend to require that level of proof which would normally be associated with reasonable or probable cause.

It is also appropriate to consider the history of, the circumstances surrounding, and the ends to be accomplished by H.B. 578. Protection Mutual Insurance Company v. Kansas City, 504 S.W.2d 127 (Mo. 1974). In the present instance the history, circumstances, and purposes of H.B. 578 are provided in Section A of the bill, which reads as follows:

"Because immediate action is necessary in order to prevent certain federal funds from being cut off from payment to the State of Missouri and because there are available other federal funds if this act is passed, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the Constitution, and this act shall be in full force and effect upon its passage and approval."

It is contemplated, therefore, that passage of H.B. 578 would render the State of Missouri eligible for federal funds. To be eligible, Missouri law must be in compliance with the appropriate federal regulations, i.e., it must provide for a system of reporting known or suspected instances of child abuse. The emergency clause is, therefore, a clear indication that it is intended that H.B. 578 be interpreted in compliance with the federal statute and regulation and that the federal interpretation is adopted. This is similar to the rule that when the legislature adopts a statute from another jurisdiction, it is presumed to adopt the interpretation placed upon that statute by the courts of that jurisdiction. State v. Anderson, 515 S.W.2d 534 (Mo.Banc 1974).

The primary purpose of statutory construction is to ascertain and to effectuate legislative intent. Missouri Pacific Railroad Company v. Kuehle, 482 S.W.2d 505 (Mo. 1972); State ex rel. Cooper v. Cloyd, 461 S.W.2d 833 (Mo.Banc 1971). We believe that the intent of H.B. 578 clearly and unequivocally expressed by the emergency clause and that Section 10 can be effectuated by a reasonable interpretation of the term "reasonable cause to believe."

Honorable Kenneth J. Rothman

CONCLUSION

It is our opinion that the term "reasonable cause to believe" as used in H.B. 578 is the equivalent of the term "suspected" as used in the Federal Register, Volume 39, No. 245, Section 1340.3-3 (d)(2)(i).

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert Presson.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

May 30, 1975

OPINION LETTER NO. 149

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Elementary and
Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Re: Extension of FY 1975 Missouri State Plan for
Title III of the Elementary and Secondary
Education Act into FY 1976.

Dear Commissioner Mallory:

In response to your letter of May 5, 1975, please find attached hereto a copy of Opinion Letter No. 216, dated June 27, 1973, in which I certified the State Board of Education's State Plan for fiscal year 1974 under Title III of the Elementary and Secondary Education Act of 1965, as amended.

This Opinion Letter continues to represent the opinion of this office and, therefore, the conclusions reached therein would be equally applicable to the same plan submitted as the state plan or annual program plan for fiscal year 1976.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth", is written over a horizontal line.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH
ATTORNEY GENERAL

November 5, 1975

OPINION LETTER NO. 151

Honorable William Raisch
State Representative, District 107
9904 Vassel Drive
St. Louis, Missouri 63123

Dear Representative Raisch:

This letter is in response to your question asking:

"May the Board of Directors of a Fire Protection District in St. Louis County provide for the payment of benefits to the widows and/or minor children of members of the said Fire Department who lose their lives but not in the performance of their duties?

A) If so, must such approval be submitted to the voters of the district or may the Board of Directors authorize same by Ordinance as part of the firemens compensation."

Section 321.600(15), RSMo, relative to the powers of the boards of directors in first class counties, provides in pertinent part:

"To provide for the pensioning of the salaried members of its organized fire department of the district and to provide for the payment of death benefits to the widows and minor children of members of its organized fire department, or if such member is unmarried or without minor children, to his next of kin, including adult children, if any, or

Honorable William Raisch

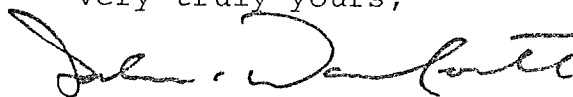
other person designated by him or his estate, who lose their lives while on duty; and to provide for the payment of health, accident or disability benefits to such salaried members of its organized fire department, who shall become disabled due to injury or disease incurred while on duty or in the performance of their duties; except that no board shall have the authority herein set forth until approved by the qualified voters of the districts concerned as herein provided. On order of the board of a district or on petition of twenty-five qualified voters who are real property owners within the district, an election shall be held on the question of whether the authority of this subdivision shall be exercised by the board, and the secretary shall cause to be published notice of the election as herein provided and shall cause to be submitted to the qualified voters of the district at the next annual election of the members of the board or at a special election called for the purpose a separate ballot containing the question. . . ."

(Emphasis added)

The authority of the board is thus limited to providing death benefits to the widows and children of salaried members "who lose their lives while on duty", subject to voter approval.

In addition, for your information, we are enclosing a copy of Opinion No. 217 - 1975, to Treppler.

Very truly yours,



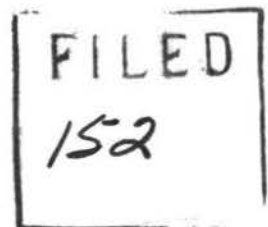
JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 217 - 1975

June 13, 1975

OPINION LETTER NO. 152
Answer by Letter - Klaffenbach

Honorable John T. Russell
State Representative, District 150
c/o House Post Office
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Russell:

This letter is in response to your question asking:

"Does a committeeperson forfeit or vacate their position with a county political committee if the person changes residence to another township?"

You also state that:

"A member of one of the political central committees in Laclede County was elected and serving on the central committee however, the question about their continued service on the committee because of change in residence did come before the central committee. It's my understanding that the person in question did move to another township within the county."

Section 120.770, RSMo, requires that a candidate for the office of committeeman or committeewoman be a qualified voter of the voting precinct or district for which he or she seeks office. Under Section 120.800, RSMo, the county committee is composed of the committeemen and committeewomen elected in the several townships or voting districts.

Honorable John T. Russell

Section 120.760, RSMo, provides in part as follows:

" . . . the word 'precinct' and the words 'election districts' shall include and refer to wards or townships as the case may require, but shall not apply to any subdivision less than a ward within any city subdivided into wards or to any subdivision less than a township in any county."

It is our view that the opinions of this office, which we enclose and which are listed below, are applicable and that the residency requirement is a continuous one. See also, State v. Bohannon, 421 P.2d 877, 882 (Ariz. 1966); State ex rel. Repay v. Fodeman, 300 A.2d 729, 730 (Conn. 1972), and authorities cited therein.

Thus, a committeeman or committeewoman who changes his or her place of residence from the township or ward in which he or she was elected vacates his or her office.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. Ltr. No. 54
2/28/69, Mittendorf

Op. Ltr. No. 447
9/11/70, Howe

Op. No. 81
8/2/72, Gant

November 18, 1975

OPINION LETTER NO. 153
Answer by letter-Mansur

Honorable Robert A. Young
State Senator, District 24
3500 Adie Road
St. Ann, Missouri 63074

FILED

153

Dear Senator Young:

This is in response to your request for an opinion from this office as follows:

"In regard to 4th Class Cities (RS Mo 79.100 and 79.120)

Questions involved are three-fold:

1. Is the acting President of the Board of Aldermen to be counted as a Board member for purposes of establishing a quorum at the meeting?
2. Does he have the right to vote along with the other members of the Board on all resolutions and ordinances?
3. Does he have the power of the veto?

"Mayor absent from meeting of Board of Aldermen, and the vote of the President of the Board can pass or defeat a resolution."

We understand your question applies to a fourth class city with four aldermen with only three aldermen present at the meeting with the mayor being absent.

Government of cities of the fourth class is provided for in Chapter 79, RSMo.

Honorable Robert A. Young

Section 79.050, RSMo, provides for the election of a mayor and a board of aldermen. Section 79.060, RSMo, provides that a city of the fourth class shall by ordinance be divided into not less than two wards and two aldermen shall be elected from each ward. Section 79.090, RSMo, provides that in the absence of the mayor the board of aldermen shall elect one of their own number to occupy the place temporarily, who shall be styled "acting president of the board of aldermen."

Section 79.100, RSMo, provides in part that the acting president of the board of aldermen shall for the time being, perform the duties of mayor, with all the rights, privileges, powers, and jurisdiction of the mayor, until the mayor's return. Section 79.120, RSMo, provides in part that the mayor shall preside over the board of aldermen but shall not vote on any question except in case of a tie. Section 79.130, RSMo, provides that no ordinance shall be passed unless the majority of the members elected to the board of aldermen vote for it and the ayes and nays be entered on the journal.

In Doughtery v. City of Excelsior Springs, 85 S.W. 112 (K.C.Mo. App. 1904), the court held that in a city of the fourth class with the board of aldermen consisting of four members and with three members together with the mayor present at the board meeting, the three members present being a majority of the whole body, a quorum is present for the transaction of business of the council.

In answer to your question whether the acting president of the board of aldermen is to be counted as a board member for purposes of establishing a quorum at the meeting and whether he has a right to vote along with other members of the board on all resolutions and ordinances, we have been unable to find any appellate court decision in this state on these precise questions.

In McQuillin on Municipal Corporations, Volume 4, § 13.25 (1968) regarding the right of the presiding officer of a municipal body to vote, it is stated as follows:

"A councilman chosen to preside in the absence of the mayor or other presiding officer does not lose his right, while serving as such, to vote as a member, even though the mayor is entitled only to a casting vote upon a tie; but if serving as mayor pro tempore he cannot also vote as mayor."

Appellate court decisions in five states are cited in support of this rule including Shugars v. Hamilton, 92 S.W. 564, 565 (Ky. 1906) where the following statement is made:

Honorable Robert A. Young

"At a regular meeting of the council assembled at the place designated, four members of the council, being a majority of the whole board, constitute a quorum for the transaction of business, although the mayor may not be present. Under the statute (section 3634) it is the duty of the mayor to preside at meetings of the council, and he may only vote in case of a tie. In his absence, a member of the council may be chosen as mayor pro tem.; but this does not deny him the right to vote as a member of the council. Of course, he cannot also vote as mayor. The mere fact that he is discharging temporarily the duties of the office of mayor does not interfere with the performance of his duties as councilman, and he may be counted as a councilman for the purpose of a quorum, to constitute which the presence of four members of the council is necessary. *City of Somerset v. Smith*, 49 S. W. 456, 20 Ky. Law Rep. 1488; *Bybee v. Smith*, 61 S. W. 15, 22 Ky. Law Rep. 1684."

Harris v. People ex rel. Squires, 70 P. 699 (Colo. 1902), involved a regular meeting of the board of trustees of the town, four trustees present, one presiding as mayor pro tem, and the court stated, l.c. 699-700:

". . . The material question here, and the one decisive below, is the right of the trustee, when sitting as mayor pro tem., to vote in the absence of a tie. The statute prescribes the number of votes requisite to elect. 2 Mills' Ann. St. § 4445. This necessary number relator received, provided the vote cast by the trustee sitting as mayor pro tem. was properly counted. This officer was a member of the board of trustees before his election as mayor pro tem., and entitled to vote. By such election he did not lose his character or status as a member. This being true, he retained his right to vote. Am. & Eng. Enc. Law, 1034; 1 Beach, Pub. Corp. § 292. The same rule obtains in this body as in our state or in the national house of representatives, with reference to the speaker. In the two bodies last mentioned, a member of the house is elected as the speaker; he does not cease to be a member by such election. Among his rights

Honorable Robert A. Young

as a member is that of voting. He does not lose it by becoming speaker. In re Speakership, 15 Colo. 520, 526, 25 Pac. 707, 11 L. R. A. 241; Whitney v. Village of Hudson, 69 Mich. 189, 198, 37 N. W. 184. The mayor pro tem. in the case before us was a voting member of the body,--entitled to vote on any question as a member thereof. This true, his vote was legally counted for relator."

It is, therefore, our view that the acting president of the board of aldermen of a fourth class city is to be counted as a board member for the purpose of establishing the existence of a quorum and he has the right to vote along with the other members of the board on resolutions and ordinances.

Opinion Letter No. 138 issued August 15, 1967, to Jack E. Gant, which held that the president of the board of aldermen cannot vote except in case of a tie vote, is hereby withdrawn.

In answer to your question whether the acting president of the board of aldermen has the power to veto, we have been unable to find any appellate court decision in this state on this precise point.

In the case of Hunter v. City of Louisville, 208 Ky. 562 (1925), the Kentucky Court of Appeals was presented the question of the power to approve an ordinance by the president of the board of aldermen when the mayor of Louisville was temporarily absent from the city.

The court said, l.c. 563-564:

"Section 2795, supra, provides that except a resolution to adjourn every proposed ordinance or joint resolution which has passed the general council shall be presented to the mayor, and if he approves it he shall sign it and then it shall be obligatory. By the section the mayor is given authority to disapprove all such ordinances and joint resolutions, setting forth his objections in writing. Authority is then given the general council, by two-thirds vote of its two bodies, to pass the proposed ordinance or resolution over the mayor's veto. Section 2789, supra, among other things, provides:

Honorable Robert A. Young

'Should the mayor be temporarily absent or unable to discharge his duties, his office shall be administered by the president of the board of aldermen, who shall continue to discharge the duties of the office during the continuance of the disability or the absence of the mayor.'

"By a strained process of reasoning, hard to comprehend, appellant insists that the legislature, by the use of the word 'administered' in the statute above, intended that only certain ministerial duties of the mayor might be performed in his absence by the president of the board of aldermen. We are unable to agree with him. The statute in question plainly provides that if the mayor be temporarily absent or unable to discharge his duties 'his office shall be administered by the president of the board of aldermen,' and that that official shall 'discharge the duties of the office' during the disability or absence of the mayor. It clearly was intended that during the temporary absence or disability of the mayor the president of the board of aldermen should discharge, not certain of the duties of the office, but that the office with all its functions and prerogatives and all its duties should be administered by the president of the board of aldermen. If appellant's contention should be upheld a state of case easily could arise in which the business of the great city of Louisville would be seriously handicapped for lack of a chief executive. A long, serious illness might disable the mayor and prevent his performing the duties of his office for a considerable length of time. According to appellant's contention, under those conditions, only certain ministerial duties of the office could be performed by the president of the board of aldermen, though he does not point out what duties of the office, as he understands it, the president of the board of aldermen might then perform. He contends that the approval or vetoing of legislative enactments are not included in the ministerial

Honorable Robert A. Young

duties that may be performed by the president of the board of aldermen in the absence of the mayor. Under his contention, under the circumstances above, the welfare of the city might be seriously impaired for lack of some one to fill the office of mayor. It was that and similar situations that the legislature had in mind when it provided that in the absence or during the disability of the mayor his office should be administered by the president of the board of aldermen, who, by the section of the statute, supra, was given authority to discharge all the duties of the office of mayor during the continuance of the disability or absence of the mayor."

Such case holds that an acting mayor has the power to approve or veto bills under the provisions of a statute giving the president of the board of aldermen the power to discharge all the duties and responsibilities of the mayor during the mayor's absence.

Section 79.100, RSMo, provides as follows:

"When any vacancy shall happen in the office of mayor by death, resignation, removal from the city, removal from office, refusal to qualify, or from any other cause whatever, the acting president of the board of aldermen shall, for the time being, perform the duties of mayor, with all the rights, privileges, powers and jurisdiction of the mayor, until such vacancy be filled or such disability be removed; or, in case of temporary absence, until the mayor's return."

It is our view that the provisions of Section 79.100, giving the president of the board of aldermen the powers of the mayor during the mayor's absence, authorize such officer to veto ordinances passed by the board of aldermen.

Section 79.130, RSMo, provides in part as follows:

". . . No bill shall become an ordinance until it shall have been signed by the mayor or person exercising the duties of the mayor's office, or shall have been passed over the mayor's veto, as herein provided."

Honorable Robert A. Young

Section 79.140, RSMo, provides in part as follows:

"Every bill duly passed by the board of aldermen and presented to the mayor and by him approved shall become an ordinance, and every bill presented as aforesaid, but returned with the mayor's objections thereto, shall stand reconsidered. . . ."

Under the provisions of Section 79.130, the president of the board of aldermen, that is, the person exercising the duties of the mayor's office, is given specific statutory authority to approve an ordinance but is not given specific statutory authority to veto an ordinance. However, it appears that Section 79.130 also gives the power to the mayor pro tem to veto an ordinance because the provisions of Section 79.140 provides that a bill passed by the board of aldermen and approved by the mayor shall become an ordinance. It is clear, however, that the provisions of Section 79.130, providing for approval by the president of the board of aldermen, have to be read into Section 79.140 insofar as reference is made to "mayor" and therefore it appears that the president of the board of aldermen is included within the term "mayor" as used in Section 79.140 providing for the procedure to be followed when a bill which is passed by the board of aldermen is approved or vetoed. It is, therefore, our view that under the provisions of Sections 79.100 and 79.130, RSMo, the president of the board of aldermen of a fourth class city is authorized to veto ordinances when he is performing the duties of the mayor because of the absence of the mayor.

Yours very truly,

JOHN C. DANFORTH
Attorney General

OFFICERS:
CITY OFFICERS:
SUNSHINE LAW:

Meetings of the Columbia City Council regarding the hiring of a municipal judge or city manager fall within the "personnel" exception of § 610.

025(4) of the Sunshine Law (§§ 610.010, et seq., RSMo Supp. 1973) and therefore may be closed to the public.

OPINION NO. 155

July 18, 1975

Honorable Larry R. Marshall
State Senator, District 19
32 North 8th Street
Columbia, Missouri 65201



Dear Senator Marshall:

This opinion has been issued in response to your request for an official written opinion on the following question:

"Under the Sunshine Law passed in 1973 and the exception to open meetings for personnel matters, does a public official such as a municipal judge or city manager come within the definition of personnel, thereby allowing the closed meeting for the selection of said individuals?"

In relating the facts underlying this opinion request, you note that the Columbia City Council soon will be meeting to appoint a successor to Roger D. Hines, who recently was removed from the office of municipal judge of the City of Columbia by the Missouri Supreme Court. See In re Hines, No. 59067 (Mo.Banc July 14, 1975). We shall, therefore, treat your question as dealing specifically with the Columbia City Council.

Your reference to the "Sunshine Law," of course, is to §§ 610.010 et seq., RSMo Supp. 1973, commonly known as the "Sunshine Law" or "Sunshine Bill." Section 610.015 requires, inter alia, that "all public meetings shall be open to the public." "Public meeting" is defined by § 610.010(3) as:

". . . any meeting, formal or informal, regular or special, of any public governmental body, at which any public business is discussed, decided or public policy formulated;"

Honorable Larry R. Marshall

The term "public governmental body" is defined in § 610.010 (2) as:

" . . . any constitutional or statutory governmental entity, including any state body, agency, board, bureau, commission, committee, department, division, or any political subdivision of the state, of any county or of any municipal government, school district or special purpose district, and any other governmental deliberative body under the direction of three or more elected or appointed members having rule-making or quasi-judicial power;" (Emphasis added)

The Columbia City Council is a governmental entity created by the charter of the city (Article I, § 2), which is a municipal government of constitutional origin (Article VI, § 19, Constitution of Missouri). Therefore, the regular and special meetings of the city council normally are required to be open to the public by § 610.015. Cohen v. Poelker, 520 S.W.2d 50, 52-53 (Mo.Banc 1975).

There are, however, certain exceptions to the operation of § 610.015, including § 610.025(4) which provides, in part, that "meetings relating to the hiring, firing or promotion of personnel of a public governmental body" may be closed to the public.

Since your question seeks to determine whether council meetings relating to the hiring of "public officials" such as the municipal judge or city manager may be closed to the public, the determinative factor is whether these officials may be classified as "personnel" of the Columbia City Council. If they may be so classified, § 610.025(4) authorizes (but does not require) such meetings to be closed.

The term "personnel" is not defined in Chapter 610. Furthermore, it appears the term has never been judicially defined by any appellate court of this state. Nor is reference to the open meetings laws of other states particularly enlightening. The exception relating to personnel matters is undoubtedly the most common exception in open meetings statutes. See note, Open Meetings Statutes: The Press Fights For The "Right To Know," 75 Harv.L.Rev. 1199, 1208 (1962); Wickham, "Let The Sun Shine In! Open-Meeting Legislation Can Be Our Key to Close Doors in State and Local Government," 68 N.W.L.Rev. 480, 485 (1973). However, in most statutes where the exception appears, the phrase "public officer or employee," or similar language is used, rather than "personnel."¹

¹Alaska Stat. Ann. § 44.62.310(c)(2) (1974); Ark. Stat. Ann.

Honorable Larry R. Marshall

The personnel exception to New Mexico's open meetings law applies to "personnel matters." N.M.Stat. Ann. § 5-6-23(E) (Supp. 1974). This phrase, however, is not defined in the statute; nor has it been interpreted by the New Mexico courts. In fact, the word "personnel" does not appear to have been judicially defined in any jurisdiction.

We must, therefore, look to the well-established rule of statutory construction that words appearing in a statute must be given their "plain and ordinary meaning." State ex rel. Dravo Corporation v. Spradling, 515 S.W.2d 512, 517 (Mo. 1974); State v. Brady, 472 S.W.2d 356, 358 (Mo. 1971).

Unquestionably, the "plain and ordinary meaning" of the word "personnel" is rather broad. Its meaning is variously defined in standard American dictionaries as:

"a body of persons employed in some service (as the army or navy, a factory, office, airplane)." Webster's Third New International Dictionary (Unabridged Edition, 1969), at p. 1687;

"the body of persons employed in any work, undertaking or service," The Random House Dictionary of the English Language (Unabridged Edition, 1965), at p. 1075;

"[t]he body of persons employed or active in an organization, business or service." The American Heritage Dictionary of the English Language (1969 Edition), at p. 979.

In view of these rather expansive definitions and in view of the subsection's reference to "hiring, firing and promotion," it is our view that the word "personnel" as used in the context of § 610.025(4) refers to officers or employees of a public governmental body

¹Footnote continued:

12-2805 (1968); Ariz. Rev. St. Ann. 38-431.03(A)(1) (Supp. 1973); Calif. Gov. Code § 54957 (1971 Supp.); Ida. Code Ann. 67-2345(a) (Supp. 1974); Ill. Ann. Stat. ch. 102, § 42 (Smith-Hurd Supp. 1975); Mont. Rev. Codes Ann. § 82-3402(3) (1966); N.H. Rev. Stat. Ann. § 91-A:3 (II) (b) (1973 Supp.); N.C. Gen. Stat. § 143.318.3(b) (1974); Okla. Stat. Ann. 25 § 201 (1974 Supp.); Ore. Rev. Stat. § 192.660 (Supp. 1973); S.C. Code Ann. § 1-20-3(b)(1) (1974 Cum. Supp.); Tex. Rev. Civ. Stat. Art. 6252-17(2)(g) (Supp. 1974); Vt. Stat. Ann. tit. 1, § 313(3) (Supp. 1974); Va. Code Ann. § 2.1-344 (1) (1975 Cum. Supp.); Wis. Stat. Ann. § 66.77(3)(b) (Supp. 1973); Wyo. Stat. Ann. § 9.692.14(ii) (Cum. Supp. 1973).

Honorable Larry R. Marshall

who are hired or appointed by, and who are subject to removal by, such governmental body. This definition would, of course, encompass both the municipal judge and city manager of Columbia, since both officials are hired by, and subject to removal by, the Columbia City Council. (See Article XV, § 114, and Article III, § 19, Columbia City Charter). Hence, pursuant to subsection (4) of § 610.025, meetings relating to the hiring of such officials may be closed to the public.

In reaching this conclusion, we are not unmindful that this law should be liberally interpreted (see Op. Atty. Gen. No. 330, Volkmer, 12-18-73), and that consequently, exceptions to its operation should be strictly or narrowly construed. 73 Am.Jur.2d Statutes § 313 (1974) at p. 463-464.

The legislature, in drafting § 610.025(4), did not distinguish between classes or levels of "personnel" of a public governmental body. Certainly, nothing in the language employed in § 610.025(4) justifies such a distinction, no matter how narrowly the word "personnel" is defined. If the legislature had intended to exclude certain public officers or employees from the exception contained in this subsection, it could easily have done so. Its failure to make such a distinction cannot be regarded as an oversight. In any event, in interpreting this subsection, ". . . We are bound by what the General Assembly said, not what it might have said. . . ." State v. Richardson, 495 S.W.2d 435, 440 (Mo.Banc 1973).

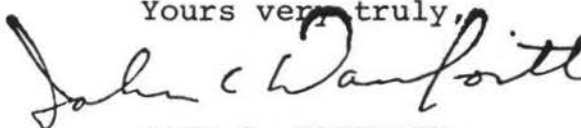
Hence, since there exists no basis for excluding a municipal judge or city manager from the "personnel" exception of § 610.025 (4), it follows that meetings relating to the hiring of such officials may be closed to the public.

CONCLUSION

It is the opinion of this office that meetings of the Columbia City Council regarding the hiring of a municipal judge or city manager fall within the "personnel" exception of § 610.025(4) of the Sunshine Law (§§ 610.010, et seq., RSMo Supp. 1973) and therefore may be closed to the public.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Philip M. Koppe.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 330
12-18-73, Volkmer



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

June 13, 1975

OPINION LETTER NO. 157

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

In accordance with Section 125.030, RSMo, we have prepared a ballot title for House Joint Resolution No. 13, 78th General Assembly. The ballot title is:

"Amends Section 7, Article X, Missouri Constitution, by deleting twenty-five year limitation on laws granting partial tax relief for lands devoted exclusively to forestry purposes."

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

July 1, 1975

OPINION LETTER NO. 158

Honorable James I. Spainhower
State Treasurer
Post Office Box 210
Jefferson City, Missouri 65101

Dear Mr. Spainhower:

This letter is in response to your question asking:

"Do the Funds recovered from checks written on the State Highway Fund or State Road Fund, which are not presented for payment within one year, revert to the above funds or the General Revenue Fund of the State?

"In the event it is your opinion that the funds revert to General Revenue, could the State Highway Commission request a replacement check out of the General Revenue Fund, payable to the proper vendor, where upon receipt of said check, it would be transmitted back to the fund from which it was originally charged and written, rather than being sent to the vendor?"

It is also our understanding that the State Highway Commission on October 10, 1974, sent a check made payable to a vendor to the Office of Administration, Division of Accounting, for cancellation. It appears, however, that the check was not canceled and was subsequently lapsed and the funds transferred to general revenue. The Commission has now requested that the amount of the check be restored to the road fund.

It is our view that the Missouri Supreme Court case of State Highway Commission v. Spainhower, 504 S.W.2d 121 (Mo. 1973) is

Honorable James I. Spainhower

decisive of the questions involved. In that case the court held that the interest derived from the investment of state road funds by the State Treasurer must be credited to the road fund and could not be diverted to general revenue.

You note in your request that Section 30.200, RSMo, provides in part that moneys set aside to pay any outstanding check or draft which has not been presented for payment shall be transferred to general revenue. In view of the holding in the case cited, it is our view that such provision is not applicable to checks or drafts drawn on the state road fund.

Therefore, the amount involved should be restored to the road fund.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

July 2, 1975

OPINION LETTER NO. 159

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Elementary and
Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This letter is in response to your request for our review and certification of the State Board of Education's Annual Program Plan for the Consolidation of Libraries and Learning Resources, Educational Innovation and Support under Title IV of the Elementary and Secondary Education Act of 1965, as amended, by P.L. 93-380 (1974), 20 U.S.C. Section 1801 et seq.

Our review has taken into consideration Title IV of the Elementary and Secondary Education Act of 1965, as amended; proposed Federal Regulations (40 Federal Register 11686-11695, March 12, 1975); Article III, Section 38(a) and Article IX, Section 2(a), Missouri Constitution.

It is the opinion of this office that:

1. The Missouri State Board of Education is the "State Educational Agency" required by Section 403(a)(1), P.L. 93-380 (1974), to have authority to act as the sole agency to submit the Annual Program Plan.
2. The Missouri State Board of Education has authority under state law to carry out or arrange for the carrying out of the programs described in the Annual Program Plan;

Dr. Arthur L. Mallory

3. All Annual Program Plan provisions with respect to the use of funds under Title IV can be carried out in the state.

Very truly yours,

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

July 1, 1975

JOHN C. DANFORTH
ATTORNEY GENERAL

*Physicians - Medical Consultants
to State Hospitals*

OPINION LETTER NO. 160

Mr. Lawrence L. Graham, Director
Department of Social Services
Broadway State Office Building
Jefferson City, Missouri 65101

Dear Mr. Graham:

This letter is in response to your question asking:

"Do the provisions of Section 105.710
RSMO (Cumulative Supplement 1973), setting
up the tort defense fund, cover licensed
physicians when they act as medical consul-
tants to state owned hospitals?"

It is our understanding that there are various different ar-
rangements made with private physicians relative to medical treat-
ment provided to state patients at state expense. The section to
which you refer, Section 105.710, RSMo, includes in its provisions:

". . . other officers, employees and agents
of the division of corrections, the division
of health, the division of family services,
the department of mental health, members of
the Missouri national guard and officers and
employees of the department of natural re-
sources assigned to state parks and the ad-
ministration of state parks . . ."

We assume that such consultants are not employees and the
question of whether or not they are "agents" of such divisions or
departments is largely a question of fact. In the question you
pose, however, the facts may vary considerably from case to case;
and it appears appropriate that the question of whether a consult-
ing physician is within the scope of the provisions of the tort
defense law should, therefore, be determined by this office on a

Mr. Lawrence L. Graham

case to case basis. That is, it is our view that it is not appropriate for this office to render an official opinion under the provisions of Section 27.040, RSMo, respecting opinions of this office, which would attempt to resolve the myriad situations which exist because this office has a duty to interpret the provisions of the tort defense fund in litigation matters involving the fund at the time the questions arise giving due consideration to the precise facts of each case.

Therefore, we must respectfully decline to issue an opinion on the question you present.

We enclose, however, Opinion No. 133 issued May 3, 1973, to George M. Camp and No. 136 issued April 4, 1973, to Bert Shulimson, were are self-explanatory and illustrate the principles and problems involved in determining whether an employment or agency situation exists.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 133
5-3-73, Camp

Op. No. 136
4-4-73, Shulimson

July 2, 1975

OPINION LETTER NO. 162

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Elementary and
Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101

FILED

162

Dear Dr. Mallory:

This is in answer to your request for our review and certification of the State Board of Education's Application for Grant to Strengthen a State Department of Education under the Elementary and Secondary Education Act of 1965, Title V, Part A, Section 503, P.L. 89-10, as amended, for the fiscal year 1976.

It is the opinion of this office that the Missouri State Board of Education is the agency in this state primarily responsible for state supervision of public elementary and secondary schools, and is the "State educational agency" as defined in Section 801(k) of Title VIII of P.L. 89-10, as amended; and that the State Board of Education has the authority under state law to submit an application for a grant pursuant to Title V, Part A, Section 503, P.L. 89-10.

In conjunction with this letter opinion which constitutes our official certification of the application, we have completed the required certification form.

Very truly yours,

JOHN C. DANFORTH
Attorney General

STATE PURCHASING AGENT:
INSURANCE:

Under Chapter 34, RSMo, relating to the state purchasing agent, the definition of "contractual services" is not limited to those items specifically mentioned. The phrase "contractual services" includes insurance purchased by the state, and, therefore, any such insurance must be purchased pursuant to the provisions of Chapter 34, RSMo, except as otherwise provided by law.

OPINION NO. 163

August 22, 1975

Mr. J. Neil Nielsen
Commissioner
Office of Administration
Room 125, Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Nielsen:

This is in response to your request for an opinion wherein you ask us to review a previous opinion of this office, Opinion No. 28, dated May 14, 1943, to Ted Ferguson. That opinion held that the state purchasing agent did not have authority to purchase insurance for state departments and was based upon an interpretation of § 14590, RSMo 1939, which defined supplies as follows:

"The term 'supplies' used in this chapter shall be deemed to mean supplies, materials, equipment, contractual services and any and all articles or things, except as in this chapter otherwise provided. Contractual service shall include all telephone, telegraph, postal, electric light and power service, and water, towel and soap service. The term 'department' as used in this chapter shall be deemed to mean department, office, board, commission, bureau, institution, or any other agency of the state."

Under this definition, Opinion No. 28 in 1943 concluded that by specifically including "telephone, telegraph, postal, electric light and power service, and water, towel and soap service," in the definition of "contractual services" this excluded any other

Mr. J. Neil Nielsen

contractual service. Accordingly, the opinion then held that the contractual service of insurance was excluded from the purview of the state purchasing law.

The state purchasing law is now found in Chapter 34, RSMo, and although the definitions have been rearranged somewhat, the definitions are basically the same.

First of all, § 34.030 does require the purchasing agent to purchase all "supplies" for all departments of the state, except as otherwise provided in Chapter 34. Thus, as with the 1943 opinion, the question will depend upon the definition of supplies.

Section 34.010.4 defines supplies as follows:

"The term 'supplies' used in this chapter shall be deemed to mean supplies, materials, equipment, contractual services and any and all articles or things, except as in this chapter otherwise provided."

As you can see, the question still depends on what is meant by "contractual services" as there is no doubt that the purchase of insurance would be purchasing a contractual service. Contractual services is thus defined in § 34.010.1 as follows:

"'Contractual services' shall include all telephone, telegraph, postal, electric light and power service, and water, towel and soap service."

Thus, there is no question but that you are asking whether the 1943 opinion was correct in holding under these identical definitions of "contractual services" that by so defining "contractual services" to include certain specific things, this necessarily excludes other things. As stated above, the basis of the 1943 opinion was to rely upon the rule "expressio unius exclusio alterius", which means the expression of one thing is the exclusion of another.

It is our opinion that after reviewing the 1943 opinion that the application of this rule to § 34.010 is incorrect. Section 34.010(1) clearly states that contractual services shall "include" various enumerated items. The general rule in Missouri is that the use of the word "include" implies that there may be other items which are not mentioned. See St. Louis County v. State Highway Commission, 405 S.W.2d 149 (Mo. 1966); and Lynch v. Gleaner Combine Harvester Corp. 17 S.W.2d 554 (K.C.Mo.App. 1929).

Mr. J. Neil Nielsen

These cases state essentially that the meaning of the word "include" may vary according to its context. Ordinarily, it is not a word of limitation but rather of enlargement. When used in connection with a number of specified objects it implies that there may be others which are not mentioned.

Accordingly, it is our opinion that the 1943 opinion was in error and we therefore withdraw that opinion.

CONCLUSION

It is the opinion of this office that under Chapter 34, RSMo, relating to the state purchasing agent, the definition of "contractual services" is not limited to those items specifically mentioned. The phrase "contractual services" includes insurance purchased by the state, and, therefore, any such insurance must be purchased pursuant to the provisions of Chapter 34, RSMo, except as otherwise provided by law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Walter W. Nowotny.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

COUNTIES:
DEPOSITARIES:
COUNTY COURTS:
COUNTY DEPOSITARIES:

Counties, cities, and other political subdivisions specified in Section 110.010, RSMo, are authorized to invest their funds in time deposits, including certificates of deposit. Advertisement for bids is not required.

OPINION NO. 164

July 23, 1975



Honorable George W. Lehr
State Auditor
State Auditor's Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Lehr:

This opinion is in response to the question you have posed as follows:

"May counties, cities, and other political subdivisions, invest funds in time deposits, including certificates of deposit, pursuant to Chapter 110, RSMo?"

It has been the view of this office, as originally expressed in Opinion No. 177, December 20, 1963, to Robert B. Mackey, that counties, and others found within the provisions of Chapter 110, RSMo -- DEPOSITARIES FOR PUBLIC FUNDS, were authorized to invest their funds in "time deposit-open account" but not in certificates of deposit. We take the opportunity of this opinion request to reevaluate that particular holding.

Some discussion of the background of Chapter 110 may be of value.

Prior to the enactment of what is now (with changes) contained in Chapter 110, RSMo, there was no authority for the county treasurer to deposit county funds in a bank. The result was that some county treasurers would make secret agreements with banks whereby both profited from the use of county funds. The County Depositary Law was enacted in 1889 to remedy this situation, to regulate the deposit of such public funds in banking institutions with the primary purpose of obtaining for the county the maximum yield upon the money so deposited under safeguards to assure both the safety of the funds and freedom from favoritism.

Honorable George W. Lehr

In Denny v. Jefferson County, 199 S.W. 250, 255 (Mo. 1917), the Supreme Court stated:

"It goes without saying that the purpose of this law is to obtain for the public the largest available income from its funds. Their safety in the hands of the depositary is required to be safeguarded by ample security in addition to the responsibility of the bank, . . ."

And in State ex rel. Bank of Crane v. Hawkins, 109 S.W. 77, 79 (St. L.Ct.App. 1908), the court ruled:

". . . the county depositary act should be so interpreted as to effectuate the purposes the Legislature had in view when enacting it; that is, that the county should receive the benefit of the highest rate of interest obtainable on the county funds, at a minimum risk of losing said funds, or any part thereof. . . ."

The foregoing cases thus make clear the legislative purpose in enacting the County Depositary Law. This law constitutes the consent of the state to the creation of the particular kind of creditor-debtor relationship contemplated by general banking practices resulting from a general deposit of funds, with safeguards to assure the safe return of the funds, and with the county sharing, through bonus or interest on such funds, in the benefits resulting to the bank from such deposit.

It may well be that at the time the County Depositary Law was enacted, the legislature contemplated that the deposits made would be demand, as distinguished from time, deposits. For one thing, the amount of interest was not then limited by statute or regulation, and the interest to be paid was a matter of bargain between the parties. Since the bank would have a general idea of the amount the county would have on deposit at any particular time, and since the bank would also have a fair idea of the time or times it would be called upon to pay out moneys deposited by the county, it could determine within reason what rate of interest it should bid to be paid on the funds under the circumstances. There would be no occasion for the county to contract for a time deposit.

The instant problem arises because of restrictions and limitations upon the payment of interest imposed by federal law and regulations, none of which were remotely contemplated at the time the

Honorable George W. Lehr

County Depositary Law was enacted. Hence, whether or not the legislature contemplated that any of the county deposits would be placed on time deposit, the real question is whether the law, fairly construed in the light of its basic purpose (to obtain a return on county funds), specifically or by necessary implication prohibits time deposits generally or any type thereof.

Referring to the statute itself (Sections 110.130 to 110.260, inclusive, RSMo), we note that only once is the noun "deposit" used therein. There are several references to the act of depositing county funds, that is, phrases such as "shall deposit" and "may deposit," but nowhere is there any specific reference to the character of the deposit.

A deposit, as such term is used in the statute, is obviously a transaction peculiar to the banking business. Hence, the statute must necessarily be construed in the light of the practices used in such business but subject to the common understanding of the terms used. As generally understood, the word "deposit" includes both demand and time deposits. Thus, in the work by Newmark, "The Law Relating to Bank Deposits," which was published in 1888 and may be deemed contemporary, it is said in Section 7, at page 7:

"In short, the term deposit became a symbolical word to designate . . . all that class of contracts where money . . . was placed in the hands of banks or bankers, to be returned in other money on call or at a specified period, and with or without interest." (Emphasis added)

Section 362.010, RSMo, of our banking statute, defines both "demand deposits" and "time deposits." As used in the banking statute, the term "demand deposits" is defined as meaning "deposits, payment of which can legally be required within thirty days." The term "time deposits" is defined as meaning "all deposits, the payment of which cannot legally be required within thirty days." Identical definitions of the terms "demand deposits" and "time deposits" are contained in Section 363.010, RSMo. Hence, the sole distinction made in the banking statutes between "demand deposits" and "time deposits" is that the payment of demand deposits can be legally required within thirty days, whereas time deposits cannot be required within such period.

The definition of these terms in Parts 217 and 329 (Sections 217.1 and 329.1) of Title 12 of the Code of Federal Regulations, although differently worded and in greater detail than the Missouri statute, makes the same basic differentiation between demand and

Honorable George W. Lehr

time deposits, namely, that the payment of time deposits may never be required in less than thirty days of the date of deposit, and a demand deposit is every deposit other than a time deposit (or a savings deposit).

Bearing in mind, therefore, that both demand and time deposits are in fact deposits in banking law and practice and common understanding, we have carefully examined the language of the County Depositary Law and find neither any express language prohibiting time deposits nor language which necessarily precludes the use of time deposits under any and every circumstance. As herein noted, the basic purpose of the law was to assure, to the extent possible, that the county would receive a return in the form of interest on its funds to the maximum amount consistent with the safety of such funds. All other provisions of the law are subsidiary to this basic purpose. In the light thereof, we can perceive no legislative intent to prohibit the county court from placing some of the funds in time deposits when such can be done without detriment to the county and thereby obtain interest upon such funds which could not legally be paid upon demand deposits.

Section 217.1 of Title 12, Code of Federal Regulations, includes definitions of the following:

"(a) Demand deposits. The term 'any deposit which is payable on demand', hereinafter referred to as a 'demand deposit', includes every deposit which is not a 'time deposit' or 'savings deposit', as defined in this section.

"(b) Time deposits. The term 'time deposits' means 'time certificates of deposit' and 'time deposits, open account', as defined in this section."

As mentioned previously, the use of the term "deposits" within banking practice includes "demand deposits" and "time deposits." It is equally clear that the term "time deposits" includes "time deposits, open account" and "time certificates of deposit."

Furthermore, it is our view that the investment of public funds, pursuant to Chapter 110, RSMo, does not constitute the loaning of public funds which is prohibited by Article VI, Section 25, Missouri Constitution. State ex rel. Graham v. City of Olympia, 497 P.2d 924 (Wash.Banc 1972); Valley National Bank of Phoenix v. First National Bank of Holbrook, 320 P.2d 689 (Ariz. 1958).

Honorable George W. Lehr

Therefore, it is our view that counties, cities, and other political subdivisions are authorized to invest their funds in time deposits, including certificates of deposit, pursuant to Chapter 110, RSMo.

A further question ancillary to the foregoing is whether advertisement for bids is presently necessary. In 1937, the year federal laws prohibiting payment of interest upon demand deposits became effective as to deposits of county funds, Section 110.030, RSMo, was enacted. In mandatory language, this section expressly provides that:

"The various statutory provisions in relation to the advertisement for and receipt of bids and the award of the funds to the best bidder . . . shall be applicable only if and when, . . . it shall be lawful for banking institutions to pay interest on demand deposits, . . ." (Emphasis added)

Under federal regulations (and Section 362.385, RSMo), it is unlawful for banks to pay interest upon demand deposits. In this situation, Section 110.030 expressly governs, and by its terms, suspends all statutory provisions for advertisement for bids and lettings to the highest bidder. We find no provision in this section which limits the suspension of the various statutory provisions as to advertisement for bids for demand deposits, or which require such statutory provision to be followed for that portion of deposits which may be placed upon time deposits. To hold that there is such a requirement in the face of the all-inclusive language of the statute would be to exercise legislative functions and rewrite Section 110.030.

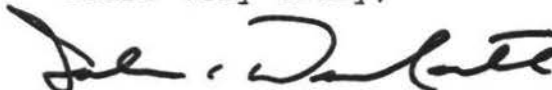
No doubt, the legislature realized that in most counties, either all or the greater percentage of the county funds, in the exercise of the sound judgment of the county court, must necessarily be placed on demand deposit, and that only a relatively small portion of the total amount could properly be placed on time deposit. Whether this is so or not, in view of the language of the statute making the requirements as to advertisements and bids applicable "only if and when" interest may lawfully be paid upon demand deposits, such requirement is presently not applicable. However, all other provisions of the County Depositary Law and related statutes, including the requirements of Sections 110.010 and 110.020, RSMo, relating to the deposit of securities by the county depositaries, are still applicable and must be followed.

Honorable George W. Lehr

CONCLUSION

It is the opinion of this office that counties, cities, and other political subdivisions specified in Section 110.010, RSMo, are authorized to invest their funds in time deposits, including certificates of deposit. Advertisement for bids is not required.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

546
July 2, 1975

OPINION LETTER NO. 165

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Elementary and
Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101

FILED

165

Dear Dr. Mallory:

In accordance with your request of June 26, 1975, we have reviewed the Missouri State Department of Elementary and Secondary Education's "Title I, ESEA, Annual Program Plan, Fiscal Year Ending June 30, 1976." This application for federal funds is being submitted under Title I of the Elementary and Secondary Education Act of 1965, P.L. 89-10, as amended.

In addition to the Elementary and Secondary Education Act of 1965, as amended, the regulations propounded pursuant thereto (45 C.F.R. 116, April 1, 1974 edition), and the proposed rules amending 45 C.F.R. 116, published in 40 Federal Register 11472, et seq. (March 11, 1975), our review has taken into consideration Article III, Section 38(a), Missouri Constitution, and Section 161.092, RSMo 1973 Supp.

Based on the foregoing, we hereby certify that the Missouri State Department of Elementary and Secondary Education has authority under state law to perform the duties and functions of a state educational agency under Title I of the Elementary and Secondary Education Act of 1965, as amended, and the regulations propounded pursuant thereto, including those arising from the assurances set forth in the application.

Dr. Arthur L. Mallory

In addition to this opinion letter which constitutes our official certification, we have executed the form of certification attached to the Annual Program Plan.

Very truly yours,

JOHN C. DANFORTH
Attorney General

July 2, 1975

OPINION LETTER NO. 166

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This letter is in response to your request for our review and certification of the Department of Elementary and Secondary Education's Annual Program Plan for Adult Education Programs under the Adult Education Act of 1970, as amended.

Our review has taken into consideration the Adult Education Act of 1970, P.L. 91-230, as amended; the federal regulations applicable to such act (45 C.F.R. part 166; 40 Fed. Reg. 17953, et seq. (April 23, 1975); Article III, Section 38(a), Article IV, Section 15, and Article IX, Sections 1(b), 2(a) and 2(b), Missouri Constitution; Sections 161.092, 171.096, and 178.430, RSMo 1969; and Section 171.091, RSMo 1973 Supp., and related provisions.

It is the opinion of this office that:

1. The Missouri State Department of Elementary and Secondary Education is the state agency primarily responsible for the state supervision of public elementary and secondary schools and is, therefore, the "State education agency" as that term is defined in 20 U.S.C. Section 1202(h).

Dr. Arthur L. Mallory

2. The Department of Elementary and Secondary Education has the authority under state law to submit this Annual Program Plan.
3. The State Treasurer has authority under state law to receive, hold and disburse federal funds under the Annual Program Plan.
4. All of the provisions of the foregoing plan are consistent with state law.

Very truly yours,

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

July 14, 1975

OPINION LETTER NO. 167

Honorable William O. Green
Prosecuting Attorney
Scotland County
Post Office Box 177
Memphis, Missouri 63555

Dear Mr. Green:

This letter is in response to your question asking whether the county court, "... having required the Treasurer to give a surety bond as custodian of school funds, [may] pay the premium for such bond from collected school tax revenues..." and related questions.

The county to which you refer is a third class county. Section 54.160, RSMo, with respect to such counties, provides that, "... in case a surety bond is required by the county court in the county, the surety bond shall be paid for by the county." This language is to be distinguished from other language preceding it in such section respecting other counties which provides that the county court pay for the surety bond "... out of the county common school funds,..."

In this respect we are enclosing Attorney General Opinion No. 82, dated March 8, 1947, to William E. Shirley, which holds that under the provisions of such section the premium for a bond to cover disbursement of school monies by the treasurer, if required by the county court, is to be paid out of county funds in counties of the third and fourth class.

Very truly yours,

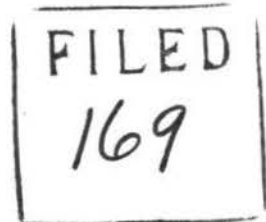
JOHN C. DANFORTH
Attorney General

Enclosure

July 22, 1975

OPINION LETTER NO. 169
Answer by Letter - Klaffenbach

Mr. Ronald L. Boggs
Prosecuting Attorney
St. Charles County
County Court House
St. Charles, Missouri 63301



Dear Mr. Boggs:

This letter is in response to your question asking:

- "1. Does any part of RSMo. 1969 Chapter 343 require that the license tax collected pursuant to Section 343.080 be paid to the State of Missouri?
- "2. Is the County of St. Charles authorized to retain the taxes collected pursuant to Section 343.080?
- "3. Does any part of Chapter 343 require that any part tax collected pursuant to Section 343.080 (1) (2) and (3) be paid to the State of Missouri under any circumstance?
- "4. Are the provisions of Section 343.080 and Section 343.240 compatible or in conflict? If in conflict, which controls?
- "5. If taxes collected for auctioneer's licenses are exactly as set out in Section 343.080 are they graduated as the word is used in Section 343.240?

Mr. Ronald L. Boggs

- "6. In Section 343.240 does 'graduate' mean 'increase'?
- "7. Is a part of the auctioneer's license tax collected to be paid to the State of Missouri only if that tax is in excess of the amounts set out in Section 343.080?"

The purpose of Chapter 343 is apparently to license certain auctioneers and to impose a duty upon certain sales. The license provisions are in the nature of taxation provisions because no qualifications for licensing are set forth and they are referred to as taxes and levies.

The first licensing act was enacted in 1820 but is substantially different from a 1855 revision. The latter remains substantially the same to date. The 1855 laws contained specific licensing fees which were greater than those in the present statutes. See Section 343.080. For some reason the 1855 laws additionally provided in Section 24 thereof that:

"The county courts of the several counties in this State, except the County Court of the county of St. Louis, shall have power to graduate the license tax, to be imposed on each license to be granted under the provisions of this act: Provided, That such tax to the State shall not be less than twenty, nor more than one hundred dollars, on each license for six months."

The above quoted section was amended in 1877 omitting the exception of the county court of St. Louis County and amending the proviso as follows:

". . . Provided, That such tax to the State shall not be less than ten nor more than one hundred dollars on each license for six months, and such tax to the county shall not be less than the amount charged for State purposes.

"Sec. 2. All acts and parts of acts inconsistent with this act are hereby repealed."

As we noted the reasoning behind the enactment of these predecessor sections to what is now Section 343.240, RSMo, escapes us, although it does appear that the repealer provision of Section 2

Mr. Ronald L. Boggs

of the 1877 laws was merely declaratory of the common law and was not intended to specifically repeal any particular part of the Laws of 1855, including Section 343.080, setting forth particular license fees.

It appears therefore that, at least prior to further amendments in 1955 reducing the levy upon every license, the county courts did have some power to "graduate the license tax to be imposed on each license to be granted." However, the Laws of 1955, page 654, Section 1, reduced the license levy to the amounts presently provided in Section 343.080 making it arguable at least that the legislature had definite limitations in mind and also arguable that the amendments to Section 343.080 impliedly repealed Section 343.240. Still, we do not believe that such amendments can be said to have repealed Section 343.240 because the amendments only reduced the amount of the license taxes and did not purport to expressly repeal Section 343.240 which could have been readily accomplished if such were intended. In this respect it should also be borne in mind that Section 343.240 was first enacted concurrently with Section 343.080 in 1855. Therefore whatever the legislature had in mind it seems clear that the county courts were given express authority to graduate the license tax within the limitations provided.

The courts, of course, have an absolute latitude in interpreting legislative intent that this office does not possess. Therefore, we are unable to predict how a court would rule in these premises.

It is our view however that the tax originated as a state tax in 1820 and remains a state tax despite the 1855 provisions because Section 343.240 treats such tax as a state tax.

However, under provisions of Section 343.240 there is found authority for the county to levy a tax payable to the county in addition to the amount charged for state purposes.

It is our further view however that the absolute lack of clarity in the provisions we have discussed suggests that, unfortunately, a declaratory judgment is the only realistic way of resolving this dilemma and that such should be sought by the county before attempting to exercise authority pursuant to Section 343.240.

Very truly yours,

C. B. Burns, Jr.
Assistant Attorney General

July 23, 1975

OPINION LETTER NO. 170
Answer by Letter - Klaffenbach

Mr. James R. Spradling
Director of Revenue
Missouri Department of Revenue
4th Floor Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Spradling:

This letter is in answer to your question asking:

"Can the Director of Revenue refuse to consider an application for an operator's or chauffeur's license for the reason that the applicant is a non-resident of this State?"

We find no provision in the laws prohibiting an otherwise qualified nonresident from applying for a Missouri motor vehicle operator or chauffeur's license. We conclude that a nonresident is not ineligible to apply for a Missouri operator or chauffeur's license if such person is qualified in all other respects.

Very truly yours,

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

August 18, 1975

JOHN C. DANFORTH
ATTORNEY GENERAL

OPINION LETTER NO. 171

Honorable Theodore L. Johnson III
County Counselor
Greene County Courthouse
Springfield, Missouri 65802

Dear Mr. Johnson:

This is in response to your request for an opinion from this office as follows:

"Does the Greene County Court or the Greene County Planning and Zoning Commission have the power by virtue of Section 229.320 Revised Statutes of Missouri to require (in the exercise of its discretion) cash bonds instead of surety bonds for the performance of the work outlined in Chapter 229.300 et sequence?

"Does the Greene County Court or the Greene County Planning and Zoning Commission have the authority to place cash bonds paid to Greene County as performance bonds in interest bearing accounts?

"The Greene County Planning and Zoning Commission in carrying out its functions under Section 229.300 et sequence for building permits can require either a cash bond or surety bond. In the past work has been performed which is unsatisfactory. Thereafter the Greene County Planning and Zoning Commission has sought to move against a surety bond provided by the individual contractor. As a result the problem is complicated by dealing with bonding companies as to the type of work,

Honorable Theodore L. Johnson III

how long it has been since the work was performed, and extent of damages. Therefore, due to the red tape required in dealing with surety bonds, Greene County is contemplating the use of only cash bonds.

"In addition (and assuming only cash bonds were given) Greene County would be desirous of placing this cash into an interest bearing account so as to derive the income therefrom."

Greene County is a county of the first class and the statutory provisions of Sections 229.300 to and including 229.370, RSMo, apply. They deal with the right of a person, firm, or corporation concerning the excavation, erection, and removal of poles, pole lines, wires, conductors, sewers, and other matters and the right to move buildings or certain vehicles across and upon any street or highway outside the city limits of any municipality in the county without first having obtained a written permit from the county highway engineer and surveyor. Section 229.320, RSMo, to which you refer, provides as follows:

"1. The county highway engineer shall have authority to require any changes in the route, or to prescribe the time, method, and manner of such moving, or the use of such street, avenue, boulevard, road, alley, public easement, or highway, or any right-of-way or appurtenances thereto, and for good cause shown, when it is necessary to protect the right-of-way of, or, any such street, avenue, boulevard, road, alley, public easement, or highway, or the safety of the public, may refuse such application.

"2. The county highway engineer may require any and all such applicants to furnish and post such cash or bond as may be necessary for the protection of the public ways herein described; and appurtenances thereof, as he may deem proper under the circumstances. It shall be a condition of such bond that the applicant will refill such excavation or restore, repair or replace any such street, avenue, boulevard, road, alley, public easement, or highway, or any part of the right-of-way thereof, disturbed or affected, so that the same will be in as good condition as before the same was used for

Honorable Theodore L. Johnson III

such purpose, and will keep and maintain the portion thereof so affected in such condition for a period of six months from the completion of such work or use, and will save such county harmless from any cost or expense occasioned or required by such work or use, for such period of time." (Emphasis added)

Section 229.330 provides as follows:

"1. If the use, excavation or encroachment of such street, avenue, boulevard, road, alley, public easement, or highway is of such nature to cause or result in disturbance or change, and the applicant fails or refuses to restore and replace such in substantially the same condition as before such use, excavation or encroachment, within thirty days after the completion of such use, excavation or encroachment, or such longer period as may be provided in writing by the county highway engineer and surveyor, such office shall give written notice to the applicant to refill, replace and restore such street, avenue, boulevard, road, alley, public easement, or highway in as good condition as it was at the time of such use, excavation or encroachment was commenced, and to keep and maintain the portion of such so affected in such condition for a period of six months from the date so fixed for the completion of such work, and to save the county harmless from any cost or expense occasioned or required in the refilling, repairing, restoring of such highway for such period, due to or occasioned by such use, excavation or encroachment.

"2. If the applicant fails or refuses to make proper restoration of said premises as required in such notice, within ten days after receipt of a registered letter containing such notice the highway engineer and surveyor may cause the necessary work to be done and charge the expense thereof to such applicant, deducting the amount therefor from the cash deposit made by such applicant or by an action on the bond, as the case may be." (Emphasis added)

Honorable Theodore L. Johnson III

You inquire whether the county court of Greene County or the Greene County planning and zoning commission have the power by virtue of Section 229.320, RSMo, to require cash bonds instead of a surety bond for the performance of the work outlined in Section 229.300.

County courts are not the general agents of the counties for the state and their powers are limited and defined by law, and they have only such authority as is expressly granted them by statute or which is necessary to carry out and make effective the purposes of the authority expressly granted. King v. Maries County, 249 S.W. 418 (Mo. 1923). Under Section 229.320, RSMo, the county highway engineer is authorized to require an applicant for a permit to perform any of the work as specified in Section 229.300 to post a cash or written bond in such amount as he deems proper under the circumstances providing that the applicant will restore or repair any street or highway disturbed or affected as a result of his action; and under Section 229.330, RSMo, if any damage is done to the street or highway as a result of his action and he fails or refuses to make proper restoration of the premises after a notice from the county highway engineer, the county highway engineer may cause the necessary work to be done and charge the expense thereof to such person and deduct the amount therefor from the cash deposit. We believe this statute is clear that this authority is granted to the county highway engineer. We find no statute giving the county court or the county planning and zoning commission any jurisdiction or authority over this matter.

You also inquire whether the Greene County court or the Greene County planning and zoning commission have authority to place the cash deposited by the applicant as a performance bond in interest bearing accounts.

We find no statute giving the county court or county planning and zoning commission any jurisdiction over the cash deposited as surety as required by Section 229.320. It is our opinion that they have no such authority by any other statute.

We believe that a statutory provision requires the county highway engineer to determine the amount of cash to be posted by the applicant and to receive the cash as deposited and any balance due the applicant from the cash shall be returned to the applicant by the county highway engineer upon the fulfillment of the obligations paid by the applicant.

The question arises whether the county highway engineer is required by law to deposit the cash on hand in interest bearing obligations. Section 61.010, RSMo, provides that in all counties of

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class one in the state there is created the office of county highway engineer and surveyor to be known as the highway engineer who shall be elected for a term of four years. Section 61.040, RSMo, provides that every duly elected highway engineer shall take an oath of office and execute and deliver to the county court a surety bond in such sum as may be fixed by the county court for the faithful discharge of his duties of office. It is our view the county highway engineer is a public official and governed by the laws that apply to public officials. In regard to the duties and liabilities of a public officer receiving public money, it is stated in City of Fayette v. Silvey, 290 S.W. 1019, 1021 (K.C.Mo.App. 1926) as follows:

" . . . The general rule, which is the rule in this state, is that one of the duties of a public officer intrusted with public money is to keep such funds safely, and that duty must be performed at the peril of such officer. Thus, in effect, he is an insurer of public funds lawfully in his possession. Shelton v. State, 53 Ind. 331, 21 Am. Rep. 197; Thomssen v. County, 63 Neb. 777, 89 N. W. 389, 57 L.R.A. 303. He is therefore liable for losses which occur even without his fault. Shelton v. State, supra. This standard of liability is bottomed on public policy. University City v. Schall, 275 Mo. 667, 205 S. W. 631.

"In the last case cited, our Supreme Court, speaking through Blair, P. J., applied this general rule to a city treasurer, into whose hands the general funds of the city had passed, finding that the mayor and aldermen had directed the funds placed to the credit of the city treasurer in a certain trust company, which later failed. The treasurer died, and the suit was instituted against the administrator of his estate. The estate was held liable under the general bond, notwithstanding the fact that the funds had been so deposited in the trust company at the direction of the board of aldermen."

We find no statutory provision requiring the county highway engineer to deposit cash in his hand in any bank or interest bearing obligations.

In Snyder v. Cowan, 25 S.W. 382 (Mo. 1894), the clerk of the circuit court had in his hands certain funds which had been paid to him as damages due the plaintiff in the condemnation proceeding in

Honorable Theodore L. Johnson III

the circuit court. The defendant loaned the money in his hands and received interest thereon in the amount of \$723.50. Plaintiff sought to recover from the clerk the above sum and was successful in maintaining his action therefor. In discussing whether the plaintiff was entitled to the interest received on this deposit, the court stated, l. c. 384, as follows:

" . . . Then, when the money had been paid into court by it for plaintiff, and no exceptions had been filed by the railroad company to the report of the commissioners, the money thus paid in was his, and he had the right to demand and receive it from the clerk at any time that he chose. . . . To whom, then, did it belong? Not the railroad company, nor the clerk, but, as a matter of course, it belonged to the plaintiff, for whose use and benefit it was paid into court. . . . Defendant was under no obligation to place the funds deposited with him as clerk of the court upon interest. 'Had he locked them up in his chest, or merely deposited them in the bank for safe-keeping, and received no compensation for the use of them, he would not have been accountable for interest; but, having placed them where they drew interest, that interest must be considered as having the same ownership as the principal which produced the interest.' Bassett v. Kinney, supra. . . . As the principal sum was the plaintiff's, it follows that the interest earned by it is his also. . . ."

It is our opinion that the county highway engineer is not required to deposit the cash he receives in lieu of a surety bond under Section 229.320 in interest bearing accounts or obligations; but, if he does so, then the interest earned would have to be returned and credited to the person making the deposit.

Yours very truly,



JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

September 10, 1975

JOHN C. DANFORTH
ATTORNEY GENERAL

OPINION LETTER NO. 172

Honorable Doris M. Quinn
State Representative, 40th District
3302 North Osage
Independence, Missouri 64050

Dear Representative Quinn:

This letter is in response to your question asking:

"Does Section 162.491 of the Public School Laws of Missouri require that candidates for the School Board be cross-endorsed by the political parties and this being the case, does that mandate that these names be listed in duplicate under each political party, with the names of each individual nominated by petition listed separately, one time only with no political party affiliation showing?"

You also state that:

"Cross-endorsement has been used by the Jackson County Democratic and Republican party committees. These committees appoint 5 member candidate selection panel for their respective parties. After the candidates are selected, they are submitted for endorsement by the other party's selection panel. The two cross-endorsed candidates for the two seats which are up for election every two years appear twice on the ballots, once under the Republican column, once under the Democratic column. An independent candidate

Honorable Doris M. Quinn

nominated by petition which requires signatures of registered voters in the district equal to 10% of the total votes cast for the candidate who received the most votes in the last board race, appears separately from the other two candidates."

Section 162.491, RSMo, to which you refer, provides:

"1. In any urban school district in a city having a population of less than three hundred thousand inhabitants, which city lies within a county which also contains a city having a population of more than three hundred thousand inhabitants, candidates for school directors may be nominated by a majority of the members-elect residing in the school district of each political party committee of the city in which the school district is located. If there is no political party committee of a city having a population of less than three hundred thousand inhabitants and lying within a county which also contains a city having a population of more than three hundred thousand inhabitants, the nominations may be made by a panel consisting of ten members, each of whom shall be at least thirty years of age and a resident of the school district. Five of the members shall be selected by a majority of the members-elect of each major political party committee of the county in which the school district is located.

"2. A certificate of nomination signed by the chairman of the party committee, by a majority of the members-elect of the committee residing in the school district, or by the majority of the members of the nominating panel, whichever is applicable, giving the names of the candidates and certifying that they have been selected by a majority of all the members-elect of the committee residing in the school district or by the majority of the members of the nominating panel, as the case may be, shall be filed with the secretary of the board of directors of the school district not later than thirty days before

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the election. In case of any vacancy in a nomination by resignation, death or otherwise, occurring after the filing of a certificate and before the election, the vacancy may be filled in the same manner as herein provided, and an affidavit shall be made by one or more members of the committee residing in the district covering all of the facts, and shall be presented to the judge of some court of record, who shall under his hand and the seal of the court grant a certificate covering the facts. The certificate shall be filed with the secretary of the board of directors of the school district.

"3. Directors for urban school districts, other than those districts containing the greater part of a city of over three hundred thousand inhabitants, may also be nominated by petition to be filed with the secretary of the board and signed by a number of voters in the district equal to ten per cent of the total number of votes cast for the director receiving the highest number of votes cast at the next preceding biennial election."

We find no legal precedent to guide us in answering your question and therefore must rely solely on our view of the legislative intent in enacting such provisions.

Under the provisions of Section 162.491, such candidates may be nominated by a majority of the members-elect residing in the school district of each political party committee of the city in which the school district is located. If there is no political party committee of such a city the nominations may be made by a panel consisting of ten members, each of whom shall be at least thirty years of age and a resident of the school district. Five of the members shall be selected by a majority of the members-elect of each majority political party committee of the county in which the school district is located.

We understand that in the case about which you inquire the nominations are made by the ten member panel. We find nothing in the statute to authorize cross filing of names of candidates so nominated as party candidates. Section 162.491 simply authorizes nominations for school director to be made by two methods; by nominating petitions and by panels consisting of the members

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of city political committees or a combination of members selected by the two major political parties. The legislative intent is that candidates be nominated for the office of school director but there is no intent that candidates be listed as political party candidates. The city political committees or the panel selected by political committees simply are representative bodies that the legislature believed should have the power of nominating candidates for school director but there is no intimation that candidates for the school boards under Section 162.491 are candidates of a political party or are to be listed under party labels. The intent clearly is that candidates can be nominated by representative bodies without having imposed on such candidates the onerous and crushing burden of securing petitions containing names equal to 10% of the votes cast for the candidate who received the most votes in the last board race. The nomination of the same candidate by two political party committees refutes any contention that such persons are party candidates as it is clear that a person cannot be a Democrat and a Republican (the two major parties at present) at the same time. It is also clear that no legislative intent is shown to authorize nominations of both Republican and Democratic candidates by a panel of Republicans and Democrats. In fact, the past practice you describe of listing candidates under both political parties (or under one political party) is, in our view, contrary to the legislative intent, illogical, confusing to the voters, and unfair to candidates nominated by petition.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

August 11, 1975

OPINION LETTER NO. 173

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Elementary and
Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Re: Amendment to FY 1976 Annual Program Plan for
Title III of the Elementary and Secondary
Education Act.

Dear Commissioner Mallory:

In response to your letter of July 7, 1975, requesting certification of the above-referenced Amendment, please find attached hereto a copy of Opinion Letter No. 216, dated June 27, 1973, and Opinion Letter No. 149, dated May 30, 1975, in which I certified the State Board of Education's Annual Program Plan for FY 1976 under Title III of the Elementary and Secondary Education Act of 1965, as amended.

These Opinion Letters continue to represent the opinion of this office and are not altered by the proposed Amendment.

Very truly yours,

JOHN C. DANFORTH
Attorney General

ELECTIONS:
CRIMINAL LAW:
HIGHWAY PATROL:
MISSOURI ELECTIONS COMMISSION:

The Missouri Elections Commission is empowered to seek and receive investigative assistance from the Missouri State Highway Patrol in the investigation of apparent violations of the Campaign Finance and Disclosure Law.

OPINION NO. 174

August 4, 1975

Mr. Albert L. Kemp, Jr.
Executive Director
Missouri Elections Commission
631 West Main Street
Jefferson City, Missouri 65101



Dear Mr. Kemp:

This is in response to your request for an opinion. In the request you have asked the following question:

Does the Missouri Elections Commission have the right to seek and receive investigative assistance from the Missouri State Highway Patrol in investigating certain apparent violations of the Campaign Finance and Disclosure Law?

Subsection 4 of Section 12 of the Missouri Campaign Finance and Disclosure Law states that the Missouri Elections Commission shall:

"Upon written complaint of any citizen or upon its own motion or upon findings reported to the Commission by the Secretary of State, investigate and report apparent violations of this act to appropriate law enforcement authorities;"

Subsection 4 of Section 14 of such law states:

"It shall be the duty of all officers of the State of Missouri charged with the enforcement of criminal law to render and furnish to the Commission when requested all information and assistance in their possession and in their power."

Mr. Albert L. Kemp, Jr.

Section 43.180, RSMo 1969, provides in part:

" . . . The members of the state highway patrol shall have full power and authority to make investigations connected with any crime of any nature. . . ."

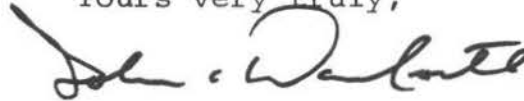
It is clear that the Missouri Campaign Finance and Disclosure Law requires the Missouri Elections Commission to investigate apparent violations of the act, while also requiring all law enforcement officers of the state of Missouri to furnish the Commission with all information and assistance in their possession and in their power. It is also clear that under Section 43.180, RSMo 1969, the Highway Patrol has the authority "to make investigations connected with any crime of any nature."

CONCLUSION

Therefore, it is the opinion of this office that the Missouri Elections Commission is empowered to seek and receive investigative assistance from the Missouri State Highway Patrol in the investigation of apparent violations of the Campaign Finance and Disclosure Law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert H. House.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written over a horizontal line.

JOHN C. DANFORTH
Attorney General

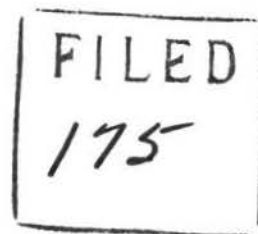
GENERAL ASSEMBLY:

1. A member of the Missouri General Assembly who took office in January, 1973, cannot during the term for which he was elected accept the position of Director of Coordination of Technical Vocational Programs for the Department of Higher Education which position was created after January, 1973, because such acceptance would violate Article III, Section 12, Constitution of Missouri.
2. A resignation submitted to the Governor by a member of the General Assembly when the General Assembly is in session is invalid and a nullity and does not result in a vacancy in office.

OPINION NO. 175

July 10, 1975

Honorable James A. Noland, Jr.
State Senator, District 33
R.F.D. #1
Osage Beach, Missouri 65065



Dear Senator Noland:

This is in response to your request for an official opinion of the Attorney General upon the following questions:

"Does Article III, Section 12, Constitution of the state of Missouri, preclude a member of the legislature [specifically a member of the senate, elected on November 5, 1972], from accepting an appointment to a position of employment with the Coordinating Board for Higher Education, Head of the Department of Higher Education?

"If so, can the senator's resignation as senator, tendered on June 18, 1975, to the Governor of the state of Missouri, be withdrawn?"

This question has arisen because you have accepted a position of employment with the Department of Higher Education. In telephone conversations with Dr. Jack Cross, Commissioner of Higher Education, we have attempted to ascertain the exact nature of this position and when it was created. As we understand the facts to be, you were appointed to the position of Director of Coordination of Technical Vocational Programs for the Department of Higher Education. As such, you are to be the staff person for the Coordinating Board for Higher Education who is responsible for

Honorable James A. Noland

the administration of the 1202 State Commission. The Coordinating Board for Higher Education has been designated by Governor Bond to be the 1202 State Commission pursuant to the provisions of Section 1202(a) of the Education Act of 1972 (Public Law 92-318) which is responsible for developing a state plan upon which it shall judge various grant requests by institutions in this state to receive federal funds under the provisions of Titles VI, VII, and X of the Higher Education Act of 1965 as amended by the Educational Amendments of 1972. The position as director was created by the Coordinating Board for Higher Education in August or September, 1974, as a result of internal restructuring of the department. You were the first person to hold this position. Prior to this time, the Coordinating Board for Higher Education had drawn upon its staff on an ad hoc basis to carry out its duties as the 1202 State Commission.

The Coordinating Board for Higher Education is the head of the Department of Higher Education. These two entities came into existence on July 1, 1974, as a result of Section 6 of the Omnibus State Reorganization Act of 1974 (C.C.S.H.C.S.S.C.S.S.B. No. 1, 77th General Assembly, First Extraordinary Session). Its predecessor, the Missouri Commission on Higher Education (Chapter 173, RSMo 1969) was abolished and was transferred by type I transfer to the Coordinating Board. In this regard it should be noted that the members of the Board are not the same as the old Commission on Higher Education and the duties of the Board have been substantially expanded.

It is further our understanding that, by letter dated June 18, 1975, and addressed to the Governor of the state of Missouri, you requested that the Governor "[p]lease accept my resignation as Senator of the 33rd senatorial district." No written correspondence, regarding your resignation, was submitted to any officer of the senate.

Article III, Section 12, Constitution of Missouri, 1945, provides:

"No person holding any lucrative office or employment under the United States, this state or any municipality thereof shall hold the office of senator or representative. When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or

Honorable James A. Noland

representative. During the term for which he was elected no senator or representative shall accept any appointive office or employment under this state which is created or the emoluments of which are increased during such term. This section shall not apply to members of the organized militia, of the reserve corps and of school boards, and notaries public." (Emphasis added)

The resolution of your first question is determined by the meaning and application attributed to the phrase, "[d]uring the term for which he was elected no senator . . . shall accept any appointive office or employment under this state which is created or the emoluments of which are increased during such term. . . ." Prior interpretations of Article III, Section 12, have concluded that said section renders a state senator ineligible to accept an appointive office but such section does not preclude him from accepting an appointment to fill a vacancy in an "elective office." See Attorney General Opinion No. 88, Gant, April 20, 1973. An office is obtained by appointment, where it is obtained by the exercise by the appointing authority of a delegated power. Said office is obtained by election where it is obtained through the direct choice of all members of the class or body from which the choice can be made. See Carter v. Commission on Qualifications of Judicial Appointments, 93 P.2d 140 (Cal. 1939). Since the position in question was obtained by appointment by the Coordinating Board for Higher Education rather than an election, we believe that the provisions of Article III, Section 12, Constitution of Missouri, would be applicable.

We must then determine whether this particular position falls within the proscription of Article III, Section 12. We conclude that it does. In Opinion Letter No. 355, Salveter, August 19, 1969, this office stated:

" . . . the purpose of Article III, Section 12, appears to be to prevent the potential conflicts of interest which would arise if a senator or representative were to have other duties with respect to other governmental bodies, . . . "

Similarly, during the constitutional debates regarding Article III, Section 12, Mr. McReynolds, handling the file on behalf of the committee, stated the purpose of the proposed section to be inter alia:

" . . . That a practice has grown up in the General Assembly where members of the General

Honorable James A. Noland

Assembly have, in the past accepted employment from the state and since they are called upon to vote upon appropriations and other matters which affect the policy of the particular departments, it was felt that a proper safeguarding of the rights of the departments and of the state in protection of itself and its interests should disqualify the members of the General Assembly from holding office of that kind or accepting employment or remuneration of that kind. . . ." Id. at 4720.

We believe that the position as Director of Coordination of Technical Vocational Programs is a position of employment which has been created during the term for which you were elected. You were elected on November 5, 1972, for a term beginning on January, 1973, and ending January, 1977. Here, the Coordinating Board for Higher Education was created on July 1, 1974, which is within the four year period. Furthermore, this particular position did not even exist until the internal restructuring of the Department of Higher Education in August or September, 1974. And, you are the first person to hold such a position. Based upon the facts as we understand them, we believe that this is a position of employment which was created during the term for which you were elected. Consequently, we conclude that you were prohibited under Article III, Section 12, Constitution of Missouri, from holding such position.

The second question presented concerns whether a resignation submitted by a member of the General Assembly to the Governor on June 18, 1975, while the General Assembly is in session, is valid.

Article III, Section 20(a), Constitution of Missouri, provides, inter alia, that:

"The general assembly shall adjourn at midnight on June thirtieth in odd-numbered years until the first Wednesday after the first Monday of January of the following year, unless it has adjourned prior thereto. All bills in either house remaining on the calendar after midnight on June fifteenth in odd-numbered years are tabled. The period between June fifteenth and June thirtieth in odd-numbered years shall be devoted to the enrolling, engrossing, and the signing in open session by officers of the respective houses of bills passed prior to midnight on June fifteenth. . . ."

Honorable James A. Noland

Since the resignation in question was submitted prior to June 30, it was submitted while the General Assembly was in session.

Section 21.090, RSMo 1969, provides:

"If any member elected to either house of the general assembly resigns in the recess thereof, he shall address and transmit his resignation, in writing, to the governor; and when any member resigns during any session, he shall address his resignation, in writing, to the presiding officer of the house of which he is a member, which shall be entered on the journal; in which case, and in all cases of vacancies happening, or being declared, during any session of the general assembly, by death, expulsion or otherwise, the presiding officer of the house in which the vacancy happens shall immediately notify the governor thereof."

This section provides that when a resignation is submitted during any session, the member ". . . shall address his resignation, in writing, to the presiding officer of the house of which he is a member, . . ." As previously stated, the resignation in question was submitted to the Governor.

The question to determine is whether the provisions of Section 21.090 are mandatory or directory. In State v. Paul, 437 S.W.2d 98, 102 (St.L.Ct.App. 1969), the court stated that the ". . . Failure to follow a mandatory statute nullifies the proceeding to which it relates. . . ." Thus, if Section 21.090 is mandatory, the resignation, not having been submitted to the proper authority, would be a nullity.

The general rule, in this state and elsewhere, is that the mandatory or directory nature of a statute is determined from the legislative intent. This depends primarily on the purpose of the enactment. See State ex rel. Hopkins v. Stemmons, 302 S.W.2d 51 (Spr.Ct.App. 1957). When the purpose relates to the essence of the thing to be done the provision is deemed mandatory. See State ex rel. Hopkins v. Stemmons, supra. Here, the purpose of Section 21.090 is clear: to provide for a procedure whereby a member of the General Assembly shall submit his resignation.

Looking to the words used by the Legislature, it is noted that when the General Assembly is in session, the resignation shall be addressed and tendered to the presiding officer of the house of

Honorable James A. Noland

which he is a member. The word "may" is permissive only, but the word "shall" is mandatory. See State ex rel. Hopkins v. Stemmons, supra; Stanfield v. Swenson, 381 F.2d 755 (8th Cir. 1967). Furthermore, to hold that Section 21.090 is merely directory would render it meaningless, since its only purpose is to provide for a procedure for the tendering of resignations and the filling of vacancies in the General Assembly.

A case which must be mentioned and distinguished from the instant situation is State ex rel. Kirtley v. Augustine, 20 S.W. 651 (Mo. 1892). In Kirtley, the court held that where a county treasurer presents his written resignation to the county court under the misapprehension that it, and not the Governor, is the proper tribunal to receive it, and the resignation is accepted and with his consent is certified to the Governor who acts thereon by designating a successor, it is then too late to recall the resignation. The distinguishing factor in the instant situation is that the resignation in question was never submitted, in any form, to the proper authority, i.e., the presiding officer of the senate. Furthermore, Section 21.090, circumvents the common law procedures for resignation, in effect at the time of the Kirtley decision, and replaces them with mandatory procedures.

Since the language and presumed intent of the Section 21.090 indicates that said section is mandatory and since the resignation was not submitted to the proper authority, the resignation is a nullity.

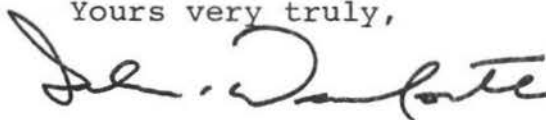
CONCLUSION

It is the opinion of this office that:

1. A member of the Missouri General Assembly who took office in January, 1973, cannot during the term for which he was elected accept the position of Director of Coordination of Technical Vocational Programs for the Department of Higher Education which position was created after January, 1973, because such acceptance would violate Article III, Section 12, Constitution of Missouri.
2. A resignation submitted to the Governor by a member of the General Assembly when the General Assembly is in session is invalid and a nullity and does not result in a vacancy in office.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert Sommers.

Yours very truly,



JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

July 16, 1975

OPINION LETTER NO. 179

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:-

In accordance with Section 125.030, RSMo, we have prepared a ballot title for House Joint Resolution No. 23, 78th General Assembly. The ballot title is:

"Repeals constitutional provision which presently requires that each election ballot be numbered and that such number be recorded on list of voters opposite voter's name."

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth", is written over the typed name.

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

July 24, 1975

OPINION LETTER NO. 180

Honorable Hugh C. Roberts, Jr.
Prosecuting Attorney
St. Francois County Courthouse
Farmington, Missouri 63640

Dear Mr. Roberts:

This letter is in response to your question asking whether the appointment by a sheriff of his wife's uncle to a position of deputy sheriff is in violation of the nepotism prohibition contained in Section 6, Article VII, Missouri Constitution.

Such section provides:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

We previously held in Opinion No. 45, dated March 10, 1952, to Jennings (copy enclosed), that it was our view that sheriffs are within such prohibition.

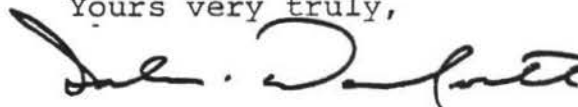
Under the principles we adopted in Opinion No. 22, dated October 12, 1933, to Dorris (copy enclosed), the relative involved is within the prohibited degree of affinity.

We further expressed our view in Opinion No. 19, dated April 5, 1956, to Connett (copy enclosed), that it is within the discretion of the prosecuting attorney as to whether or not he will bring ouster.

Honorable Hugh C. Roberts, Jr.

The question of forfeiture is a judicial question and must be determined before the officer can be ousted. State v. King, 379 S.W.2d 522, 525 (Mo. 1964).

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 45
3-10-52, Jennings

Op. No. 22
10-12-33, Dorris

Op. No. 19
4-5-56, Connett



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH
ATTORNEY GENERAL

October 15, 1975

OPINION LETTER NO. 181

Honorable E. Thomas Coleman
Representative, District 21
2919 NE Russell Road
Kansas City, Missouri 64117

Dear Representative Coleman:

This is in response to your request for an opinion from this office as follows:

"May a professional physical therapist
licensed in Missouri perform electromyography
testing?"

The practice of professional physical therapy is governed by
Sections 334.500 to 334.620, RSMo.

Section 334.500, RSMo, provides in part as follows:

"'Professional physical therapy' means the
specialized treatment of a human being by
the use of exercise, massage, heat or cold,
air, light, water, electricity, or sound,
for the purpose of correcting or alleviating
any physical or mental condition or prevent-
ing the development of any physical or men-
tal disability, or the performance of tests
of neuromuscular function as an aid to the
diagnosis or treatment of any human condition,
but does not include the use of surgery or
obstetrics nor the administration, prescrib-
ing or dispensing of any drug or medicine,
X-radiation, radioactive substance, diagnos-
tic X-ray, electrocautery or electrosurgery."

Honorable E. Thomas Coleman

Section 334.590, RSMo, provides that the licensing board may refuse to grant a license or revoke or suspend a license for unprofessional or dishonorable conduct such as:

"Practicing or offering to practice professional physical therapy independent of the prescription and direction of a person licensed and registered in this state to practice medicine and surgery whose license is in good standing;"

You inquire whether a professional physical therapist may performed electromyography testing under provisions of this statute.

Dorland's Illustrated Medical Dictionary, 23rd Edition (1957), defines electromyography as follows:

"The recording of the changes in electric potential of muscle (1) by means of surface or needle electrodes to determine merely whether the muscle is contracting or not (useful in kinesiology) or (2) by insertion of a needle electrode into the muscle and observing by cathode ray oscilloscope and loud-speaker the action potentials spontaneously present in a muscle (abnormal) or induced by voluntary contractions, as a means of detecting the nature and location of motor unit lesions; or (3) recording the electrical activity evoked in a muscle by stimulation of its nerve (useful for study of several aspects of neuromuscular function, neuromuscular conduction, extent of nerve lesion, reflex responses, etc.). . . ."

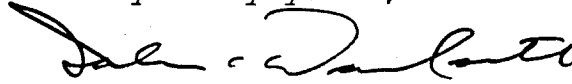
Section 334.500 expressly provides that a professional physical therapist may perform tests of neuromuscular function as an aid to the diagnosis or treatment of any human condition. According to the definition of electromyography, it is a recording of the electrical activity evoked in the muscle by stimulation of its nerves which is useful in the study of several aspects of neuromuscular function of the muscle.

It is our opinion that conducting an electromyography test, as above defined, is authorized under Section 334.500, RSMo, by a professional physical therapist, provided it is prescribed and performed under the direction of a person licensed and registered in this state

Honorable E. Thomas Coleman

to practice medicine and surgery. The tests may be performed only for the collection of data which is to be submitted to the physician who ordered the tests and the data is not to be interpreted by the physical therapist.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

EMPLOYMENT SECURITY:
CONSTITUTIONAL LAW:

1. The legislative history of the Reed Act, which provides for advances to States with depleted reserve accounts for the purpose of assisting them in the financing of their unemployment benefit payments, indicates that the advances are not regarded as a "loan to the State." 2. Any advance which would be received by the State of Missouri from the Federal Government under Title XII of the Social Security Act (42 U.S.C.A. § 1321) does not create a liability of the State of Missouri. 3. The receipt of advances by the State of Missouri under Title XII of the Social Security Act (42 U.S.C.A. § 1321) would not be in violation of Article III, Section 37 of the Missouri Constitution or subsection 1 of Section 288.330, RSMo 1969.

OPINION NO. 182

October 3, 1975

Mr. Geoffrey McCarron, Director
Department of Labor and Industrial Relations
421 East Dunklin Street
Jefferson City, Missouri 65101



Dear Mr. McCarron:

This is to acknowledge receipt of your request for a formal opinion from this office which reads as follows:

"Can the State of Missouri, Division of Employment Security receive advancements of money appropriated by the Federal Congress for the payment of Unemployment Compensation benefits? Such advancements will be placed in the Missouri Unemployment Trust Fund Account which is part of the Unemployment Trust Fund established in the Treasury of the United States under Section 904 of the Social Security Act. Advancements bear no interest. They are part of the Unemployment Compensation Fund established by Section 288.290, RSMo, needed for payment of unemployment benefits."

In addition, you further indicate as follows:

"In the last session of the Missouri Legislature a bill was passed and signed by Governor Bond (S. B. 325) increasing the

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maximum amount of unemployment benefits from \$67.00 to \$85.00 per week. The weekly benefit amount was increased from 4% to 5% of total wages paid to an eligible insured worker during that quarter of his base period in which his base period was highest. There was an insignificant tax increase on employers. Thus, the unemployment benefit account may become insufficient to pay benefits. The Federal law provides for loans for such purposes. The problem is whether Missouri can borrow from the Federal Government for the purpose of paying such benefits."

We have also been informed that it has been projected that as a result of the passage of the above legislation, the Unemployment Compensation Fund will be depleted by March, 1976.

In your opinion request you did not specifically refer to what Federal legislation is involved, but based on the memorandum attached to your request, we are presuming that you are referring to Section 1201 of Title XII of the Social Security Act (42 U.S.C.A. § 1321), commonly referred to as the Reed Act, which permits the Governor of the State to request and receive for the State's account, advances from the Federal Unemployment Trust Fund under certain conditions. In addition, based on the memorandum attached to your request, the presumption is made that you are requesting our opinion as to whether or not the receipt of such advances by the State of Missouri would be in violation of Article III, Section 37 of the Missouri Constitution or subsection 1 of Section 288.330, RSMo 1969.

In connection with the above, Article III, Section 37 of the Missouri Constitution provides as follows:

"The general assembly shall have no power to contract or authorize the contracting of any liability of the state, or to issue bonds therefor, except (1) to refund outstanding bonds, the refunding bonds to mature not more than twenty-five years from date, (2) on the recommendation of the governor, for a temporary liability to be incurred by reason of unforeseen emergency or casual deficiency in revenue, in a sum not to exceed one million dollars for any

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one year and to be paid in not more than five years from its creation, and (3) when the liability exceeds one million dollars, the general assembly as on constitutional amendments, or the people by the initiative, may also submit a measure containing the amount, purpose and terms of the liability, and if the measure is approved by a majority of the qualified electors of the state voting thereon at the election, the liability may be incurred, and the bonds issued therefore must be retired serially and by instalments [sic] within a period not exceeding twenty-five years from their date. Before any bonds are issued under this section the general assembly shall make adequate provision for the payment of the principal and interest, and may provide an annual tax on all taxable property in an amount sufficient for the purpose."

Also, subsection 1 of Section 288.330, RSMo 1969, reads as follows:

"1. Benefits shall be deemed to be due and payable only to the extent that moneys are available to the credit of the unemployment compensation fund and neither the state nor the division shall be liable for any amount in excess of such sums. Neither the state of Missouri, nor any person or agency acting for it, may under any circumstance by issuing bonds or otherwise borrow money from any source whatsoever to pay benefits hereunder." (Emphasis added)

In view of the above provisions, it is submitted that the primary issue for consideration is whether or not an "advance" received from the Federal unemployment account in the Unemployment Trust pursuant to Section 1201 of Title XII of the Social Security Act (42 U.S.C.A. § 1321) constitutes a "borrowing" which creates a "liability of the state" in violation of subsection 1 of Section 288.330, RSMo 1969, and Article III, Section 37 of the Missouri Constitution.

I

LEGISLATIVE HISTORY OF REED ACT

Mr. Geoffrey McCarron

Before proceeding further, it is our view that a discussion of the legislative history of the Reed Act would be helpful to an understanding of the problem. In 1935, the Federal Unemployment Tax was a 3% tax levied upon payrolls (up to the first \$3,000 of annual income of workers) of all employers of 8 or more workers during 20 weeks in the year in all but certain specified categories of employment. The employer was permitted to offset up to 90% of the Federal tax (2.7% of taxable payrolls) with any taxes paid to an unemployment insurance system under the laws of the State in which he did business.

In 1935, Congress passed the unemployment tax provisions of the Social Security Act, and at that time, it was believed that 10% of the total cost of the unemployment compensation program would be needed for administrative expenses. Therefore, the law provided the maximum offset of 90% (2.7% of taxable wages) and reserved 10% for the Federal Government. Federal tax collections from this source were not earmarked for employment security purposes, but instead went into the general fund of the United States Treasury. Each year the Congress of the United States would appropriate money to the States to cover the administrative expenses of this program. However, over the years and contrary to the expectation of the United States Congress, the unemployment tax collection on the Federal level exceeded in each year, the actual appropriation necessary to fund the administrative costs of the program. As a result, the Congress of the United States amended the Social Security Act of 1954 by passing the so-called Reed Bill. One of the principal features of the bill was to establish and maintain a \$200 million reserve in the Federal unemployment account which would be available for advances to the States with depleted reserve accounts for the purpose of assisting them in the financing of their unemployment benefit payments. It was indicated that the two basic needs to which these excess tax collections should be devoted were for the protection of the State trust accounts against the contingency of insolvency and to provide for greater flexibility in administrative operations. See Senate Report No. 1621 dated June 18, 1954 (which accompanied the original Reed Act), 1954 U.S. Cong. & Adm. News, Vol. 2, 83d Cong. 2d Sess. pp. 2909, 2911. In this regard, the original Title XII provided as follows:

"Sec. 1201. (a) If--

'(1) the balance in the unemployment fund of a State in the Unemployment Trust Fund at the close of September 30, 1953, or at the close of the last day in any ensuing calendar quarter, is less than the

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total compensation paid out under the unemployment compensation law of such State during the twelve-month period ending at the close of such day;

' (2) the Governor of such State applies to the Secretary of Labor during the calendar quarter following such day for an advance under this subsection; and

' (3) the Secretary of Labor finds that the conditions specified in paragraphs (1) and (2) have been met,

the Secretary of Labor shall certify to the Secretary of the Treasury such amounts as may be specified in the application of the Governor, but the aggregate of the amounts so certified pursuant to any such application shall not exceed the highest total compensation paid out under the unemployment compensation law of such State during any one of the four calendar quarters preceding the quarter in which such application was made. For the purposes of this subsection, (A) the application shall be made on such forms, and shall contain such information and data (fiscal and otherwise) concerning the operation and administration of the State unemployment compensation law, as the Secretary of Labor deems necessary or relevant to the performance of his duties under this title, and (B) the term "compensation" means cash benefits payable to individuals with respect to their unemployment, exclusive of expenses of administration.

"(b) The Secretary of the Treasury shall, prior to audit or settlement by the General Accounting Office, transfer from the Federal unemployment account to the account of any State in the Unemployment Trust Fund the amounts certified under subsection (a) by the Secretary of Labor (but not exceeding that portion of the balance in the Federal unemployment account at the time of such transfer which is not restricted as to

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use pursuant to section 903 (b)). Any amount so transferred shall be an advance which shall be repaid (without interest) by the State to the Federal unemployment account in the manner provided in subsections (a) and (b) (1) of section 1202." (Emphasis added)

In addition, the following comment was made in the 1954 U.S. Cong. & Adm. News, Vol. 2, 83d Cong. 2d Sess. at p. 2910:

"(5) Repayment of the advances obtained by States in accordance with the above conditions are to be made by either (a) transfer of funds from the trust account of the borrowing State (at the direction of its governor) to the Federal unemployment account, or (b) a decrease in the 90 percent allowable credit against the 3 percent Federal unemployment tax. . . ."

Also, the following comment was made at p. 2911:

"The provision of a loan account, as established under H.R. 5173, from which States with depleted accounts may secure repayable advances, recognizes the Federal interest in protecting the solvency of State trust accounts in a manner consistent with the original intent that States be charged with ultimate responsibility in financing the benefits which they elect to provide."

Thus, it would appear at first glance that originally the "advances" were considered by the Federal Government to be "loans" which were to be repayable by the State itself.

Subsequently in 1960, in very broad amendments to the Social Security Act, the Congress of the United States also made changes in the Unemployment Compensation Act by specifically amending Section 1201 of Title XII of the Social Security Act. Originally, the House Bill, among other things, included an amendment for improvements in the operation of the Federal unemployment account by tightening the conditions pertaining to eligibility for and repayment of advances to States with depleted reserve accounts. This was the only house amendment adopted by the conference committee. In addition, the committee's bill provided for a larger "loan fund" by increasing the amount authorized to be built up in the Federal unemployment account from \$200 million to \$500 million. See 1960 U.S.

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Cong. & Adm. News, Vol. 2, 86th Cong. 2d Sess. p. 3661. Also, in House Report No. 1799, 86th Cong. 2d Sess. submitted by Congressman Wilbur Mills, he made the following comment at p. 51:

"Broadly, the purpose of these amendments is to provide adequate funds for administration and for advances to the States whose unemployment reserves have been depleted by heavy unemployment. The amendments will improve the operation of the present "loan" fund in several particulars."

As is indicated above, the words "loan fund" are again used. As will be demonstrated, this was probably a casual misuse of language. In any event, it is clear that the amendment did not provide for obligatory repayment by the State itself. At p. 54 of the same Mills' report, the repayment provisions are characterized as follows:

"Advances made to a State after the enactment of your committee's bill, if not repaid by the State within the specified period of time [and this method is made totally optional with the Governor of each State], will be repaid under newly added provisions to the section providing for repayment of an advance through reduction in employers' credits against the Federal Unemployment Tax." (Emphasis added)

It is to be noted that the monies are now termed "advances." In addition, the amendment to Section 1201 as set forth in the 1960 U.S. Cong. & Adm. News, Vol. 2, 86th Cong. 2d Sess. pp. 3706, 3707, provides as follows:

"SECTION 1201. ADVANCES TO STATE
UNEMPLOYMENT FUNDS

(a) Advances--Subsection (a) of section 1201 provides that advances shall be made to the States from the Federal unemployment account in the Unemployment Trust Fund under the conditions specified and shall be repayable (without interest) in the manner provided in the following provisions of the Social Security Act:

(1) Section 901(d) (1) relating to repayment by the transfer to the

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Federal unemployment account of the additional tax received by reason of the reduced credits provisions of section 3302(c) (2) or (3) of the Federal Unemployment Tax Act, and the crediting of the amount so transferred against the balance of outstanding advances made to the State.

(2) Section 903(b)(2) relating to repayment by the transfer to the Federal unemployment account of the amount that otherwise would be transferred to the account of a State to be credited against the balance of outstanding advances made to the State; and

(3) Section 1202 relating to repayment by a State of outstanding advances by transfers from the State account."

To summarize the foregoing discussion, prior to the 1960 amendment, Section 1201 of Title XII (42 U.S.C.A. § 1321) reads as follows:

" . . . Any amount so transferred shall be an advance which shall be repaid (without interest) by the State to the Federal unemployment account in the manner provided in subsections (a) and (b) (1) of section 1202." (Emphasis added)

However, as a result of the 1960 amendment, the sentence quoted above was deleted. Instead, the wording of subsection (a) of Section 1201 was amended, so that insofar as repayment is concerned, it now reads as follows:

"Section 1201(a) (1) Advances shall be made to the States from the Federal unemployment account in the Unemployment Trust Fund as provided in this section, and shall be repayable, without interest in the manner provided in section 901(d)(1) (42 U.S.C.A. 1101(d)(1)), 903(b)(2) (42 U.S.C.A. 1103(b)(2)) and 1202 (42 U.S.C.A. 1322) of this title." (42 U.S.C.A. § 1321)

Mr. Geoffrey McCarron

Thus, as a result of the above legislation, the monies are now deemed "advances." The phrase "shall be repaid by the State" was dropped.

In reviewing the Reed Bill, it is also helpful to consider the legislative history to the Temporary Unemployment Compensation Act of 1958 which was adopted two years before the 1960 amendment to Section 1201 of Title XII. Briefly, this legislation provided for temporary additional unemployment compensation benefits to covered employees who had exhausted their benefits under State and specified Federal laws. The legislation further authorized the Secretary of Labor to enter into agreements with State agencies administering the unemployment compensation laws of such States or with other authorized officials under which the State agencies would make payments of temporary unemployment compensation under the bill as agents of the United States. The legislation did not impose Federal benefits or eligibility standards upon the States nor did it compel the States to accept its provisions. In discussing the repayment provisions, Senate Report No. 1625, the majority report, as set forth in the 1958 U.S. Cong. & Adm. News, provided on p. 2585 as follows:

"Your committee is of the opinion that the payments made under this bill should not be regarded as a loan to the States. The bill authorizes appropriation of the money for these Federal benefits out of the general funds of the Treasury. Although provision is made in the legislation for ultimate restoration to the Treasury of the amount so used, this restoration is accomplished not by requiring repayment by the States but through the exercise of the Federal taxing power wholly separate from the terms of any agreement with a State to carry out the program for paying temporary additional compensation.

"Although the funds obtained under title XII of the Social Security Act as amended by the Reed Act in 1954 are used by the States to pay benefits provided by their State laws and the funds obtained under your committee bill would be used to pay Federal benefits as agents of the United States, the restoration provisions under both are essentially the same.
. . ."

Similarly in 1963, the Temporary Unemployment Compensation Act of 1958 was revised. In general, House Report No. 8821 indicated

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that the purpose of the legislation was to revise the provisions of law relating to the methods by which amounts made available to the State pursuant to the Temporary Unemployment Compensation Act of 1958 and Title XII of the Social Security Act were to be restored to the Treasury, by modifying the rate of employer repayment, and by permitting at the option of the State each year, installment repayments by a State in lieu of additional employer taxes. See 1963 U.S. Cong. & Adm. News, Vol. 2, 88th Cong. 1st Sess. p. 1098. In addition, in House Report No. 860, p. 1 which accompanied House Report No. 8821, it was indicated that House Report No. 8821 was designed:

"To revise provisions of law relating to the methods by which amounts made available to the States pursuant to the T.U.C.A. of 1958 and Title XII of the Social Sec. Act are to be restored to the Treasury. . . ."

". . . that legislation was financed by federal money made available to the states out of the general funds of the Treasury. Provision was made in that legislation for the ultimate restoration to the States, but through the exercise of the Federal Taxing power."
(Emphasis added)

It is interesting to note that the above comments were made by the same Congressman, Wilbur Mills, who in 1960 had referred to the Reed Act as a loan fund. Like the Reed Act, the Temporary Unemployment Compensation Act of 1958 and its 1963 revision provided for the repayment of advances by the reduction of credits on an employer's Federal Unemployment Tax under what is now 26 U.S.C.A. § 3302(c)(2). The only distinction between the present Reed Act and the Temporary Unemployment Compensation Act of 1958 and its 1963 revision is that the present Reed Act provides for two additional methods of repayment which will be discussed.

To summarize the legislative history of the Reed Act, the monies now received under the Reed Act are now deemed to be "advances." As a result of the 1960 amendment to the Reed Act, the phrase "shall be repaid by the State" in Section 1201 was dropped. Consequently, the method of repayment is generally as follows: (1) by reduction in the State's share of the amount of any excess in the employment security administration account that would otherwise be transferred to the State's account in the Unemployment Trust Fund; (2) through a transfer of funds from the State's account in the Unemployment Trust Fund to the Federal unemployment account; or (3) by a reduction in the

Mr. Geoffrey McCarron

total credit otherwise allowed to an employer subject to the Unemployment Compensation Law of the State. As will be discussed, none of these methods of repayment constitutes an obligatory repayment by the State itself, either out of its general revenues or even out of the State's account of the Federal Unemployment Trust Fund. Therefore, it is submitted that the legislative history of the Reed Act indicates that advances made under this legislation are not regarded as a loan to the State itself.

II

OPERATION OF REED ACT UNDER FEDERAL LAW

We will now examine the operation of the Reed Act in its present form. Section 1321 of subchapter 12 entitled, "Advances to State Unemployment Funds," is found in Title 42 of the United States Code Annotated. This section reads as follows:

"(a)(1) Advances shall be made to the States from the Federal unemployment account in the Unemployment Trust Fund as provided in this section, and shall be repayable, without interest, in the manner provided in sections 1101(d)(1), 1103(b)(2) and 1322 of this title. An advance to a State for the payment of compensation in any month may be made if--

(A) the Governor of the State applies therefor no earlier than the first day of the preceding month, and

(B) he furnishes to the Secretary of Labor his estimate of the amount of an advance which will be required by the State for the payment of compensation in such month.

(2) In the case of any application for an advance under this section to any State for any month, the Secretary of Labor shall--

(A) determine the amount (if any) which he finds will be required by such State for the payment of compensation in such month, and

(B) certify to the Secretary of the Treasury the amount (not greater than

Mr. Geoffrey McCarron

the amount estimated by the Governor of the State) determined under subparagraph (A).

The aggregate of the amounts certified by the Secretary of Labor with respect to any month shall not exceed the amount which the Secretary of the Treasury reports to the Secretary of Labor is available in the Federal unemployment account for advances with respect to such month.

(3) For purposes of this subsection--

(A) an application for an advance shall be made on such forms, and shall contain such information and data (fiscal and otherwise) concerning the operation and administration of the State unemployment compensation law, as the Secretary of Labor deems necessary or relevant to the performance of his duties under this subchapter,

(B) the amount required by any State for the payment of compensation in any month shall be determined with due allowance for contingencies and taking into account all other amounts that will be available in the State's unemployment fund for the payment of compensation in such month, and

(C) the term 'compensation' means cash benefits payable to individuals with respect to their unemployment, exclusive of expenses of administration.

(b) The Secretary of the Treasury shall, prior to audit or settlement by the General Accounting Office, transfer from the Federal unemployment account to the account of the State in the Unemployment Trust Fund the amount certified under subsection (a) of this section by the Secretary of Labor (but not exceeding that portion of the balance in the Federal unemployment account at the time of the transfer which is not restricted as to use pursuant to section 1103(b)(1) of this title)."

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Thus, under the above legislation, the Governor of the State is permitted to request and receive for the State's account, advances from the Federal unemployment account in the Unemployment Trust Fund under certain conditions, and that these advances are repayable, without interest. As is indicated, there are three methods of repayment:

(1) By reduction in the State's share of the amount of any excess in the Federal employment security administration account which would otherwise have been transferred to the State's account in the Unemployment Trust Fund. In this regard, 42 U.S.C.A. § 1103(a)(1) and (b)(2) reads as follows:

"(a)(1) If as of the close of any fiscal year after the fiscal year ending June 30, 1972, the amount in the extended unemployment compensation account has reached the limit provided in section 1105(b)(2) of this title and the amount in the Federal unemployment account has reached the limit provided in section 1102(a) of this title and all advances pursuant to section 1105(d) of this title and section 1323 of this title have been repaid, and there remains in the employment security administration account any amount over the amount provided in section 1101(f)(3)(A) of this title, such excess amount, except as provided in subsection (b) of this section, shall be transferred (as of the beginning of the succeeding fiscal year) to the accounts of the States in the Unemployment Trust Fund.

(2) Each State's share of the funds to be transferred under this subsection as of any July 1--

(A) shall be determined by the Secretary of Labor and certified by him to the Secretary of the Treasury before that date on the basis of reports furnished by the States to the Secretary of Labor before June 1, and

(B) shall bear the same ratio to the total amount to be so transferred as the amount of wages subject to contributions under such State's unemployment compensation law during the preceding calendar year which have been reported to the State before May 1 bears to the total of wages subject to contributions

Mr. Geoffrey McCarron

under all State unemployment compensation laws during such calendar year which have been reported to the States before May 1.

* * *

(3) The amount which, but for this paragraph, would be transferred to the account of a State under subsection (a) of this section or paragraph (1) of this subsection shall be reduced (but not below zero) by the balance of advances made to the State under section 1321 of this title. The sum by which such amount is reduced shall--

(A) be transferred to or retained in (as the case may be) the Federal unemployment account, and

(B) be credited against, and operate to reduce--

(i) first, any balance of advances made before September 13, 1960 to the State under section 1321 of this title, and

(ii) second, any balance of advances made on or after September 13, 1960 to the State under section 1321 of this title."

Under the above-statutory provisions, there would be a transfer of any excess amount in the Federal account to the State account under the provisions of (a)(1) if certain conditions occur. However, until there is actually a transfer, the funds involved are strictly Federal funds. Furthermore, by indicating in (b)(2) that these funds must be applied first toward the repayment of any advance, the Federal Government is actually using Federal funds raised by the Federal taxing authority to reduce the balance of any advance. Insofar as the State itself receiving funds under this section, it is wholly conjectural, and the funds are clearly not State funds until they would be received by the State. Therefore, it is submitted that this method of repayment does not create a State liability.

(2) Through a transfer of funds from the State's account in the Unemployment Trust Fund to the Federal unemployment account. In this regard, 42 U.S.C.A. § 1322 reads as follows:

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"The Governor of any State may at any time request that funds be transferred from the account of such State to the Federal unemployment account in repayment of part or all of that balance of advances, made to such State under section 1321 of this title, specified in the request. The Secretary of Labor shall certify to the Secretary of the Treasury the amount and balance specified in the request; and the Secretary of the Treasury shall promptly transfer such amount in reduction of such balance."

It is to be noted that the above language provides that the Governor of any State may at any time request that funds be transferred from the account of such State to the Federal unemployment account in repayment of part or all of that balance of advances.

In this regard, there is numerous authority to support the proposition that the word "may" is permissive, rather than mandatory. See Words and Phrases, Vol. 26A, p. 390. As a result, this method of repayment is discretionary with the Governor of the State, and so long as he does not exercise his discretion there is no State liability created. Therefore, it is our view that this method of repayment does not create any mandatory obligation of payment by the State itself.

(3) By a reduction in the total credit otherwise allowed to an employer subject to the Unemployment Compensation Law of a State when filing his Federal Unemployment Tax form. In this regard, 42 U.S.C.A. § 1101(d)(1) provides as follows:

"(d)(1) The Secretary of the Treasury is directed to transfer from the employment security administration account--

(A) To the Federal unemployment account, an amount equal to the amount by which--

(i) 100 per centum of the additional tax received under the Federal Unemployment Tax Act with respect to any State by reason of the reduced credits provisions of section 3302(c)(3) of such Act and covered into the Treasury for the repayment of advances made to the State under section 1321 of this title, exceeds

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(ii) the amount transferred to the account of such State pursuant to subparagraph (B) of this paragraph.

Any amount transferred pursuant to this subparagraph shall be credited against, and shall operate to reduce, that balance of advances, made under section 1321 of this title to the State, with respect to which employers paid such additional tax.

(B) To the account (in the Unemployment Trust Fund) of the State with respect to which employers paid such additional tax, an amount equal to the amount by which such additional tax received and covered into the Treasury exceeds that balance of advances, made under section 1321 of this title to the State, with respect to which employers paid such additional tax.

(2) Transfers under this subsection shall be as of the beginning of the month succeeding the month in which the moneys were credited to the employment security administration account pursuant to subsection (b)(2) of this section."

Also, 42 U.S.C.A. § 3302(c)(3) provides as follows:

"(3) If an advance or advances have been made to the unemployment account of a State under Title XII of the Social Security Act on or after the date of the enactment of the Employment Security Act of 1960, then the total credits (after applying subsections (a) and (b) and paragraphs (1) and (2) of this subsection) otherwise allowable under this section for the taxable year in the case of a taxpayer subject to the unemployment compensation law of such State shall be reduced--

(A) (i) in the case of a taxable year beginning with the second consecutive January 1 as of the beginning of which there is a balance of such advances, by 10 percent of the tax imposed by section 3301 with respect to the wages paid by

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such taxpayer during such taxable year which are attributable to such State; and

(ii) in the case of any succeeding taxable year beginning with a consecutive January 1 as of the beginning of which there is a balance of such advances, by an additional 10 percent, for each such succeeding taxable year, of the tax imposed by section 3301 with respect to the wages paid by such taxpayer during such taxable year which are attributable to such State;

(B) in the case of a taxable year beginning with the third or fourth consecutive January 1 as of the beginning of which there is a balance of such advances, by the amount determined by multiplying the wages paid by such taxpayer during such taxable year which are attributable to such State by the percentage (if any) by which--

(i) 2.7 percent, exceeds

(ii) the average employer contribution rate for such State for the calendar year preceding such taxable year; and

(C) in the case of a taxable year beginning with the fifth or any succeeding consecutive January 1 as of the beginning of which there is a balance of such advances, by the amount determined by multiplying the wages paid by such taxpayer during such taxable year which are attributable to such State by the percentage (if any) by which--

(i) the 5-year benefit cost rate applicable to such State for such taxable year or (if higher) 2.7 percent, exceeds

(ii) the average employer contribution rate for such State for the

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calendar year preceding such taxable year."

Thus, under the above-statutory provisions, any advances made under Title XII to a State after 1960 which have not been reimbursed by repayment methods #1 and #2 within a specified period of time are recouped by means of a reduction of Federal credit allowed to employers subject to the Unemployment Tax Act. An explanation as to how this procedure mechanically works is set forth in the C.C.H. Unemployment Insurance Reports § 1160, p. 4249.-3 which reads as follows:

"If no such repayment is made, reductions in credit are made as follows: for the taxable year beginning with the second January 1 after an advance is made, the credit is reduced by 10% of 3% (the deemed federal rate for credit purposes), or .3%. For the following taxable year, the credit is reduced by 20% of 3%. In the case of the third and fourth consecutive taxable years for which there has been an outstanding balance of advances as of January 1, if the state has (for the calendar year preceding such taxable year) collected as contributions from employers on remuneration subject to the state law less than an amount equal to 2.7% of the total remuneration subject to contributions under the state law (as determined by the state by April 30 of the taxable year, using a March 31 cutoff date), the tax credit against the federal tax due on wages paid in such taxable year will be further reduced by the amount (rounded to the nearest 0.1%) by which the average employer contribution rate is less than 2.7%.

"In the case of the fifth and succeeding consecutive taxable years for which there has been an outstanding balance of advances as of January 1, if the state has collected (for the calendar year immediately preceding the taxable year) in employer taxes less than an amount equal to one-fifth of the aggregate benefits paid in the first 5 of the last 6 years preceding the taxable year (as determined by the state by the following April 30, using a March 31 cutoff date) or an amount equal to 2.7% of the state taxable remuneration (for the calendar

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year immediately preceding the taxable year), whichever is higher, then the tax credit against the federal tax will be further reduced. The reduction will be a rate, rounded to the nearest 0.1%, which, when applied to the state's taxable wages for such immediately preceding calendar year, would have produced the revenue necessary to make up the difference between the contributions actually paid and the average benefit cost rate (or 2.7% if higher). In determining the amount collected by the state, employee contributions may be included, if employer contributions average 2.7% or more."

Thus, as is indicated above, an employer normally receives a large credit against the amount of Federal tax, but until the advance is repaid by methods #1 or #2, that credit is steadily reduced until the advance is repaid. It is our understanding that this is the method of repayment that is most frequently used. However, as was previously indicated in our discussion of the legislative history of the Reed Act, the repayment of advances under this method is accomplished under the Federal taxing power on employers subject to the Federal Unemployment Tax Act. There is actually no State liability created or any mandatory obligation of repayment by the State itself under this method of repayment.

To summarize the foregoing discussion, any advance received by a State from the Federal Government under Title XII of the Social Security Act (42 U.S.C.A. § 1321) does not create a "liability of the State of Missouri." The reason is that there is no obligatory repayment by the State of Missouri out of its general revenues or even out of the State's account of the Federal Unemployment Trust Fund. In addition, there is no mandatory obligation for the State of Missouri to pay back the advances under any statutory provision. However, there is no "forgiveness" by the Federal Government. If the advances are not repaid by methods #1 and #2 within a specified period of time, then the advances are recouped by the Federal Government under its Federal taxing power on employers by reducing the Federal tax credit allowed to employers who are subject to the State's Unemployment Tax Act, until the advance is repaid.

III

APPLICATION OF REED ACT TO STATE LAW

Having reviewed the legislative history of the Reed Act and how the Act presently operates under Federal law, we now consider whether or not it would be a violation of Article III, Section 37

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of the Missouri Constitution and subsection 1 of Section 288.330, RSMo 1969, for the State of Missouri to receive advances under Title XII of the Social Security Act (42 U.S.C.A. § 1321). In this regard, to refresh your memory, Article III, Section 37 of the Missouri Constitution provides as follows:

"The general assembly shall have no power to contract or authorize the contracting of any liability of the state, or to issue bonds therefor, except (1) to refund outstanding bonds, the refunding bonds to mature not more than twenty-five years from date, (2) on the recommendation of the governor, for a temporary liability to be incurred by reason of unforeseen emergency or casual deficiency in revenue, in a sum not to exceed one million dollars for any one year and to be paid in not more than five years from its creation, and (3) when the liability exceeds one million dollars, the general assembly as on constitutional amendments, or the people by the initiative, may also submit a measure containing the amount, purpose and terms of the liability, and if the measure is approved by a majority of the qualified electors of the state voting thereon at the election, the liability may be incurred, and the bonds issued therefor must be retired serially and be instalment [sic] within a period not exceeding twenty-five years from their date. Before any bonds are issued under this section the general assembly shall make adequate provision for the payment of the principal and interest, and may provide an annual tax on all taxable property in an amount sufficient for the purpose."

Also subsection 1 of Section 288.330, RSMo 1969, reads as follows:

"1. Benefits shall be deemed to be due and payable only to the extent that moneys are available to the credit of the unemployment compensation fund and neither the state nor the division shall be liable for any amount in excess of such sums. Neither the state of Missouri, nor any person or agency acting for it, may under any circumstances, by issuing bonds or otherwise borrow money from any source whatsoever to pay benefits hereunder."

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First of all, as was previously indicated under the Federal legislation, the Governor of the State is the proper party to request for the State's account advances from the Federal unemployment account in the Unemployment Trust Fund (42 U.S.C.A. § 1321). Therefore, it should be noted initially that the prohibition of Article III, Section 37 of the Missouri Constitution applies to the General Assembly, and not the Governor. However, there would still be a question as a result of the language in subsection 1 of Section 288.330, RSMo 1969; and as will be subsequently discussed, we will presume that the Missouri legislature will pass legislation giving the Governor specific authority to request these advances.

In connection with the above, your attention is directed to the case of Petition of Board of Public Buildings, 363 S.W.2d 598 (Mo.Banc 1962). In this case, there was a proceeding in a petition by the State Board of Public Buildings for a decree authorizing issuance of and adjudicating validity of revenue bonds for construction of a state office building. In considering the issue of whether or not there was a violation of Article III, Section 37 of the Missouri Constitution, the Supreme Court of Missouri held that the power to enforce a contract created by bonds sold to finance construction of a state office building and a resolution calling for issuance of bonds secured by revenues arising from rental of the building did not constitute a "liability" within the constitutional restriction. The reasoning of the court on p. 605 was as follows:

" . . . We hold 'liability' here, as used in § 37, Art. 3 of our Constitution, means, in its true context, a contractual indebtedness, present or future, absolute or contingent, which will be or may be liquidated by general taxation. We do not consider that the power to enforce this contract created by the bonds and the resolution, as given to the bondholders, constitutes such an indebtedness as just defined. We can hardly conceive of a money judgment against the state or the Board in this situation, except for rentals collected and not properly accounted for." (Emphasis added)

As was previously discussed, it is our view that any advance received by a State from the Federal Government under Title XII of the Social Security Act (42 U.S.C.A. § 1321), does not create a "liability" of the State. The reason being that there is no obligatory repayment by the State itself, either out of its general revenues or even out of the State's account of the Federal

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Unemployment Trust Fund. In short, there is no mandatory obligation for the State to pay back the advances under any statutory provision. Instead, the advances are generally recouped by the Federal Government under its Federal taxing power on employers by reducing the Federal tax credit allowed to employers who are subject to the State's State Unemployment Tax, until they are repaid. Under such circumstances, it is our view that the receipt of advances by the State of Missouri under Title XII of the Social Security Act (42 U.S.C.A. § 1321), would be in accordance with the holding in the Board of Public Buildings decision, supra, and would not be in violation of Article III, Section 37 of the Missouri Constitution.

In regard to subsection 1 of Section 288.330, RSMo 1969, the word "borrow" is defined in Black's Law Dictionary as follows:

"To solicit and receive from another any article of property or thing of value with the intention and promise to repay or return it or its equivalent."

Similarly, it is pointed out in Black's Law Dictionary that the word "borrow" has been held the reciprocal action with "to lend," citing Bank of United States v. Drapkin & Goldberg Const. Co., 11 N.Y.S.2d 334, 338 (1939). Also, the word "borrower" is defined in Black's Law Dictionary as "He to whom a thing is lent at his request."

In this connection, we have previously pointed out that the legislative history of the Reed Act indicates that advances made under this legislation are not considered to be a "loan" to the State. Also, we have previously pointed out that there is no mandatory obligation for the State of Missouri to pay back the advances under any statutory provision. As a result, it is our view that advances received by the State under Title XII of the Social Security Act (42 U.S.C.A. § 1321) would not be in violation of subsection 1 of Section 288.330, RSMo 1969.

To summarize our views, it is our opinion that the receipt of advances by the State of Missouri under Title XII of the Social Security Act (42 U.S.C.A. § 1321) would not be in violation of Article III, Section 37 of the Missouri Constitution or subsection 1 of Section 288.330, RSMo 1969.

IV

AUTHORITY OF THE GOVERNOR TO REQUEST REED ACT FUNDS

Mr. Geoffrey McCarron

As previously indicated, the Governor of the State of Missouri is the proper party under Federal law to request, for the State's account, advances from the Federal unemployment account in the Unemployment Trust Fund (42 U.S.C.A. § 1321). You have not asked in your opinion request whether the Governor has authority under State law to request such advances. Our research has not found any court ruling precisely on this point; and, for that reason, we are unable to determine with certainty whether the Governor has the power to request such advances without legislative authorization to do so. We point out that at least 2 of the 5 states that have received such advances have specifically adopted legislation authorizing the Governor to request advances. For example, the State of Washington which has received approximately \$44 million in advances, has adopted legislation as found in the Revised Code Washington Annotated, Titles 49 to 50, Section 50.12.180 relating to State-Federal cooperation which provides in part as follows:

"The governor is authorized to apply for an advance to the state unemployment fund and to accept the responsibility for the repayment of such advance in accordance with the conditions specified in Title XII of the social security act, as amended, in order to secure to this state and its citizens the advantages available under the provisions of such title."

The adoption of legislation by the General Assembly to give express authority to the Governor to request advances from the Federal Government under the provisions of Title XII of the Social Security Act (42 U.S.C.A. § 1321) would eliminate any doubt as to the Governor's authority to do so. Accordingly, to preclude the possibility of any successful court challenge to the receipt of such advances, it is our recommendation that legislation be sought.

CONCLUSION

The opinion of this office is as follows:

1. The legislative history of the Reed Act, which provides for advances to States with depleted reserve accounts for the purpose of assisting them in the financing of their unemployment benefit payments, indicates that the advances are not regarded as a "loan to the State."

2. Any advance which would be received by the State of Missouri from the Federal Government under Title XII of the Social

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Security Act (42 U.S.C.A. § 1321) does not create a liability of the State of Missouri.

3. The receipt of advances by the State of Missouri under Title XII of the Social Security Act (42 U.S.C.A. § 1321) would not be in violation of Article III, Section 37 of the Missouri Constitution or subsection 1 of Section 288.330, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written over a horizontal line.

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

September 2, 1975

OPINION LETTER NO. 184

Mr. James L. Wilson, Director
Department of Natural Resources
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Mr. Wilson:

This letter is in response to your question asking:

"Under §§192.600 to 192.620, RSMo Supp., the Department of Natural Resources is authorized to make grants to publicly owned water supply districts and sewer systems for construction of water supply and sewage disposal and treatment facilities. §192.605 provides, in part:

' . . . The grants may be made to supplement funds from loan proceeds or other private or public sources when such grants are not available through any other state or federal agency.'

"In light of this statutory provision, may the Department make a grant to a public water supply district to cover a portion of the cost of constructing a water supply system, where the district is going to receive some federal grant monies, but will not receive enough federal money, together with loans and revenue bonds, to cover the entire cost of the system?"

The provision to which you refer first appeared in House Committee amendments to House Bills No. 664 and 657, 77th General Assembly, First Regular Session. The bills as originally introduced

Mr. James L. Wilson

did not contain the limitation respecting the availability of grants through any other state or federal agency. As introduced House Bill No. 657 merely authorized grants in aid to public water supply districts and House Bill No. 664 authorized such grants "to supplement funds from loan proceeds or other private or public sources." The latter bill also required that the amount of assistance from other such sources be determined before the state grant could be considered.

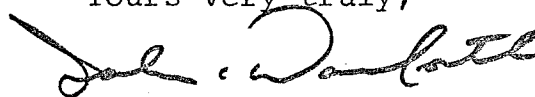
At the time the Committee amendments were made concerning the provision in question, amendments were also made containing the provisions now found in Section 192.615, RSMo Supp. 1973, requiring that the applicant must first apply with the agency or other financial source which is to furnish the "primary" financial assistance before an application for a grant could be made to and processed by the Division of Health and requiring that the applicant furnish evidence of a commitment from the "primary" financial source before a grant could be approved.

It is our view that the legislative history of these provisions indicates that it was the legislative intent to make it clear that grants made under these sections are to be secondary to other grants, and that such grants are supplementary to other financial sources. If the provision were read to deny the grant of such state funds when other state or federal funds are available, the provision would be contradictory because such grants from the Division of Health could not be supplementary to grants from other public sources if grants from other public sources were not available.

We conclude, therefore, that such Division of Health grants are secondary and supplementary to other state or federal grants, that other such state or federal grants are primary, and that there must be a commitment from a primary source before a Division of Health grant can be approved.

The answer to your question is, in our view, that the Department of Natural Resources may make a grant to such a district to cover a portion of the cost of an authorized project when the primary source federal grants are insufficient.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

October 20, 1975

OPINION LETTER NO. 185

Mr. Alfred C. Sikes
Director, Department of Consumer
Affairs, Regulation and Licensing
Post Office Box 1157
Jefferson City, Missouri 65101

Dear Mr. Sikes:

This is in response to your request for an opinion on the following question:

"Is real estate alone, to be purchased and developed as an industrial park with the proceeds of a municipal general obligation bond issue, a project for industrial development within the meaning of Section 23 (a) of Article VI, Constitution of Missouri, and Section 100.010(5) Revised Statutes of Missouri, 1969 as amended?"

Section 100.010(5), provides the following definition:

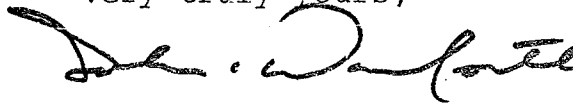
"'Project for industrial development' or 'project', the purchase, construction, extension and improvement of industrial plants, including the real estate either within or without the limits of such municipalities, buildings, fixtures, and machinery; except that any project of a municipality having fewer than eight hundred inhabitants shall be located wholly within the limits of the municipality."

Mr. Alfred C. Sikes

The authority conferred by that section is with respect to the purchase, construction, extension and improvement of industrial plants. The phrase "including the real estate" modifies purchase, construction, extension and improvement. We do not read that section as conferring independent authority for a project involving the purchase of real estate that does not also involve the purchase, construction, extension and improvement of industrial plants. Since you have stated in your opinion request that: "The plan does not contemplate the use of any of the bond proceeds to purchase, construct, extend or improve an industrial plant" we do not believe that the plan qualifies as a project as that term is defined in Section 100.010(5). The Supreme Court has held that the provisions of Article VI, Section 23(a) of the Constitution relating to industrial development are not self-executing. Petition of Monroe City v. Southern, 359 S.W.2d 706 (Mo. 1962).

Thus, since the statute does not authorize projects involving the purchase of real estate alone, we find it unnecessary to decide the hypothetical question of whether such projects comply with the Constitution, since in any event projects must comply with the statutes.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

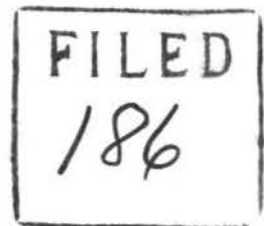
JOHN C. DANFORTH
Attorney General

MOTOR VEHICLES: (1) The Missouri Department of Revenue may register a motor vehicle in the name of the lessee of such vehicle and issue base license plates therefor without issuing a certificate of ownership (title) for such motor vehicle if such motor vehicle is otherwise properly and duly registered pursuant to the IRP; (2) however, the Missouri Department of Revenue may not register and issue base license plates for a motor vehicle without first issuing a certificate of ownership if such motor vehicle is registered pursuant to the Uniform Vehicle Registration Proration and Reciprocity Agreement.

OPINION NO. 186

October 14, 1975

Mr. James R. Spradling
Director, Department of Revenue
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Mr. Spradling:

This is in response to your request for an official opinion on the following question:

"Can the Missouri Department of Revenue register a motor vehicle in the name of the lessee of such vehicle and issue license plates therefor without issuing a certificate of title for such motor vehicle in the name of the lessee when the motor vehicle is based in this State and required to be registered here under the name of the lessee for such vehicle pursuant to the provisions of a Compact duly entered into by the Missouri Highway Reciprocity Commission?"

The licensing and registration of motor vehicles in the State of Missouri is generally governed by Section 301.020, RSMo 1969, providing that:

"Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, except as herein otherwise expressly provided, shall annually file, by mail or otherwise, in the office of the director of revenue, an application for

Mr. James R. Spradling

registration on a blank to be furnished by the director of revenue for that purpose containing:

(1) A brief description of the motor vehicle to be registered, including the name of the manufacturer, the manufacturer's or other identifying number, and character, and amount of motive power, stated in figures of horsepower;

(2) The name, residence and business address of the owner of such motor vehicle;

(3) The gross weight of the vehicle and the desired load in pounds if the vehicle is a commercial motor vehicle or trailer;

(4) If such motor vehicle be a specially constructed or reconstructed motor vehicle, the application shall so state and the owner shall furnish the director of revenue such additional information as he shall require." [Emphasis Added].

The term owner is defined in Section 301.010(21), RSMo 1969, as follows:

"'Owner', the term owner shall include any person, firm, corporation or association, who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this law;" [Emphasis Added].

As a condition precedent to the granting of a certificate of registration, Section 301.190, RSMo, provides that:

"1. No certificate of registration of any motor vehicle or trailer, or number plate

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therefore, shall be issued by the director of revenue unless the applicant therefor shall make application for and be granted a certificate of ownership of such motor vehicle or trailer, or shall present satisfactory evidence that such certificate has been previously issued to the applicant for such motor vehicle or trailer. Application shall be made within thirty days after the applicant acquires the motor vehicle upon a blank form furnished by the director of revenue and shall contain a full description of the motor vehicle or trailer, manufacturer's or other identifying number, together with a statement of the applicant's source of title and of any liens or encumbrances on the motor vehicle or trailer, provided that for good cause shown the director of revenue may extend the period of time for making said application.

"2. The director of revenue shall use reasonable diligence in ascertaining whether the facts stated in such application are true, and, if satisfied that the applicant is the lawful owner of such motor vehicle or trailer, or otherwise entitled to have the same registered in his name, shall thereupon issue an appropriate certificate over his signature and sealed with the seal of his office, procured and used for such purpose. The certificate shall contain a complete description, manufacturer's or other identifying number, and other evidence of identification of the motor vehicle or trailer, as the director of revenue may deem necessary, together with a statement of any liens or encumbrances which the application may show to be thereon.

"3. The fee for each original certificate so issued shall be one dollar, in addition to the fee for registration of such motor vehicle or trailer. If application for the certificate is not made within thirty days after the vehicle is acquired by the applicant, a delinquency penalty fee of five dollars for each month or part of a month of delinquency, not to exceed a total of twenty-five dollars, shall be imposed. If the director of revenue learns that any person has

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failed to obtain a certificate within thirty days after acquiring a motor vehicle or has sold a vehicle without obtaining a certificate, he shall cancel the registration of all vehicles registered in the name of the person, either as sole owner or as a coowner and shall notify the person that the cancellation will remain in force until the person pays the delinquency penalty fee provided in this section together with all fees, charges and payments which he should have paid in connection with the certificate of ownership and registration of the vehicle. The certificate shall be good for the life of the motor vehicle so long as the same is owned or held by the original holder of the certificate and shall not have to be renewed annually.

"4. It is unlawful for any person to operate in this state a motor vehicle or trailer required to be registered under the provisions of the law unless a certificate of ownership has been issued as herein provided."
[Emphasis Added].

The legislative scheme as set out in the above statutes indicates that, generally, in order to lawfully operate a motor vehicle in this state, one must apply for and be granted a certificate of registration and that, prior to being granted a certificate of registration, one must first apply for and be granted a certificate of ownership (title).

In 1958, the General Assembly enacted legislation establishing the Missouri Highway Reciprocity Commission, Sections 301.273-301.279, RSMo 1969. It is to these statutes that we now direct our attention, specifically, Section 301.277, RSMo 1969. This statute provides that:

"1. The commission may negotiate and enter into reciprocal agreements or arrangements with other states, the District of Columbia, territories and possessions of the United States, and foreign countries as follows:

"(1) To exempt, either wholly or partially, under such terms, conditions and restrictions as it deems proper, motor vehicles and trailers

Mr. James R. Spradling

licensed in other states, the District of Columbia, territories and possessions of the United States, and foreign countries or political subdivision thereof wherein the owner is a resident, from any or all registration fees, as provided by law, but any exemption afforded hereunder shall be extended to owners whose vehicles are duly licensed in the state of their residence only to the extent that substantially equivalent exemptions are extended by that state to vehicles which are duly licensed in this state.

"(2) If any state permits or requires the licensing of fleets of motor vehicles and trailers or combinations thereof operated in interstate or combined interstate and intrastate commerce and payment of license taxes and other fixed fees thereon on an apportionment basis commensurate with and determined by the miles traveled on and the use made of said state's highways or any other equitable basis of apportionment, and exempts equipment registered in other states under such apportionment basis from its own registration and other fixed fees, then said Missouri highway reciprocity commission may by agreement adopt such exemptions with respect to motor vehicles and trailers, which agreement may, under such terms, conditions and restrictions as the commission deems proper, provide that owners and operators of motor vehicles and trailers operated in interstate or combined interstate and intrastate commerce in Missouri shall be required to pay registration and other fees on an apportionment basis commensurate with and determined by the miles traveled on and the use made of Missouri highways, or any other equitable basis of apportionment, and shall provide a fair and equitable formula for apportionment whereby there shall be registered in Missouri and the Missouri registration fees paid and applied to a proper proportion of said motor vehicles and trailers operated in the fleet.

"(3) Such agreements may authorize the granting of reciprocal privileges to an owner

Mr. James R. Spradling

for vehicles which are not licensed in the state, District of Columbia, territory or possession of the United States, foreign country, or other place of such owner's residence when such owner maintains a bona fide place of business in a state, District of Columbia, territory or possession of the United States, foreign country or other place other than his residence and such vehicle is in fact based at such a place of business and is principally operated into and out of such a place of business as a terminal of its operation and such vehicle is duly licensed in the state, District of Columbia, territory or possession of the United States, foreign country, or other place where such place of business is located. Before reciprocal privileges are granted to an owner under such agreement authorized by this subsection, the commission may, under such conditions and terms as it deems advisable, require such owner to apply for a basing point permit which, among other things, shall name the state, District of Columbia, territory or possession of the United States, foreign country, or other place in which such vehicle is to be licensed.

* * *

"3. Notwithstanding any other provision of law, no reciprocity shall be granted under any statute or agreement for the operation of any commercial motor vehicle within the state of Missouri solely in intrastate commerce, but all vehicles so engaged must be duly registered and licensed in the state of Missouri."

It is apparent from the foregoing that the legislative intent and purpose in establishing the Commission was to create a body empowered to provide an additional mechanism for the registration and licensing of motor vehicles through the adoption of reciprocal agreements. As Section 301.277, RSMo 1969 suggests, these agreements may include procedures that deviate from or otherwise abrogate those traditional procedures and concepts outlined in Sections 301.020 and 301.190, RSMo 1969. As the court recognized in Ruan Transport Corporation v. Missouri Highway Reciprocity Commission, 369 S.W.2d 220, 222 (Mo. Banc 1963), "... fleet

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proration registration is a new and different concept." It is our belief that the General Assembly, aware of the recent developments in and needs of the modern motor transportation industry, created the Commission to provide flexibility in meeting these developments and needs. In view of the statutory scheme established by the General Assembly, particularly noting the powers of the Commission as outlined in Section 301.277, RSMo 1969, it is our view that the General Assembly intended that the Commission may enter into reciprocal agreements and may establish by such agreements licensing and registration procedures that may deviate from or otherwise abrogate those established by statute.

In view of the foregoing, the fundamental problem inherent in your question is the relationship between these two sets of statutes; those general registration and licensing statutes on the one hand and those establishing the Missouri Highway Reciprocity Commission on the other. Recognizing the general rule of statutory construction that statutes should be construed so as to effectuate their purpose, it is our opinion that both sets of statutes can be consistently construed and applied in accordance with the General Assembly's apparent intent and purpose.

There is no question that prior to a vehicle's being operated in this state it must be properly registered and licensed. However, in view of the above statutory provisions, it is our belief that the established statutory scheme evidences the General Assembly's intent to provide at least two methods by which a vehicle may be duly and properly registered.

First, a vehicle may be registered pursuant to Section 301.020, RSMo 1969, in which case certificates of ownership and registration must be applied for by and granted to the owner of the vehicle and standard license plates issued. Second, a vehicle, if otherwise within the scope of a reciprocal agreement, may be licensed and registered pursuant to the terms and conditions outlined in the agreement. If so registered, a vehicle need only comply with those requirements contained in the agreement and shall be properly and duly registered in this state upon compliance with those requirements. An applicant need not additionally comply with those state statutory registration requirements if he has otherwise complied with the requirements contained in the agreement. By otherwise requiring all applicants to conform to state registration requirements, the Department of Revenue ignores the development of the Commission and those powers bestowed upon it by Section 301.277, RSMo 1969. This would, in effect, serve to undermine the Commission's ability to enter into registration agreements and impose registration requirements upon such terms, conditions and restrictions as it deems proper pursuant to Section 301.277, RSMo 1969, and would thereby frustrate the legislative intent to

Mr. James R. Spradling

provide a flexible mechanism to meet current developments in the trucking industry. For this reason, we believe that where the Commission has entered into an agreement pursuant to Section 301.277, RSMo 1969, and where that agreement outlines those procedures to be followed relating to the registration of certain vehicles, then an applicant seeking to register a vehicle as part of an operating fleet pursuant to said agreement need only meet those requirements of the agreement. If an applicant meets those requirements, he need not additionally meet those outlined in other state statutes. The only restriction upon the issuance of proper registration of such a vehicle would be that the applicant be seeking such registration pursuant to a duly negotiated reciprocal agreement and that any vehicle for which the privileges are claimed have a valid and legal certificate of ownership (title) issued for the vehicle by the state or jurisdiction in which it is purportedly titled.

Obviously, any determination as to whether the vehicle is properly and duly registered pursuant to an agreement requires our examination of the terms and conditions of the agreement itself. For example, if an agreement details a registration procedure to be followed by an applicant, said applicant must comply with those procedures. On the other hand, an agreement may simply state that a vehicle must comply with the licensing and registration statutes of a base jurisdiction. In that case, the applicant must comply with those registration statutes of a base jurisdiction in order to be properly and duly registered pursuant to the terms and conditions of the agreement. Therefore, we must now direct our attention to the reciprocal agreements in question.

Although your request does not refer to specific agreements, the attached material included with your request indicates your concern with those agreements dealing with apportioned registration. Therefore, we assume your request is limited to a consideration of only the International Registration Plan and the Uniform Vehicle Registration Proration and Reciprocity Agreement as those are the only apportionment agreements entered into by the Commission.

The International Registration Plan (IRP) provides as follows concerning fleet registration:

"An applicant for proportional registration shall file a uniform application with the Commission of the base jurisdiction in lieu of registration under other applicable statutes. [Section IV, A(1)]

Mr. James R. Spradling

"A. The Commissioner of the base jurisdiction shall register apportionable vehicles upon application and payment of the registration fees as provided in Articles III and IV. Payment of additional fees for each vehicle so registered may be required by the Commissioner of the base jurisdiction, in an amount provided by statute or regulation of the base jurisdiction for issuance of a plate. A registration card shall be issued for each vehicle registered by the Commissioner of the base jurisdiction and the card shall appropriately identify the vehicle for which it is issued, list the jurisdictions in which the vehicle has been apportioned, the weight and classification of fee for which registered according to the applications and payments furnished by the applicant. Such registration card shall be carried in or upon the vehicle, for which it has been issued, at all times.

"B. Vehicles registered as provided in Section A of this Article shall be deemed fully registered in all jurisdictions where proportionally registered for any type of movement or operation provided the registrant has proper interstate or interstate authority from the appropriate regulatory agency or is exempt from regulation by the regulatory agency." [Section V]

The IRP outlines those procedures to be followed by applicants registering pursuant to the Plan. The Plan expressly provides that an applicant need only file a uniform application and pay the appropriate fee in lieu of registration under other applicable statutes. Therefore, fleet vehicles registered pursuant to the IRP need only comply with the registration requirements outlined in the IRP and need not further comply with those other state statutes outlining additional registration requirements, i.e., Sections 301.020, 301.190, RSMo 1969. A fleet vehicle registered in Missouri pursuant to the IRP is duly and properly registered in this state when registered in compliance with the Plan. The Department of Revenue need not issue a certificate of ownership (title) for such motor vehicle.

Furthermore, Section IX-A provides that when the proportional registration is of vehicles leased to motor carriers on a long

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term basis, the lessee shall be the registrant. Thus, in registering the vehicle in this state, the lessee does so pursuant to the authority of the IRP compact and not as the "owner" of the vehicle as defined in Section 301.010(21), RSMo 1969. The lessee need not qualify as an "owner" to be entitled to proportionally register his vehicle in this state if registration is pursuant to the IRP compact. Therefore, the Department of Revenue need not require a lessee registering pursuant to the IRP compact to qualify as an "owner" as a condition precedent to registration. Moreover, because not an "owner" as defined by statute, a lessee is not eligible to receive nor can he be required to secure a certificate of title pursuant to Section 301.190 as a condition precedent to registration.

In light of the above, it is our opinion that a lessee seeking to proportionally register a vehicle in this state pursuant to the terms of the IRP compact may do so even though he does not qualify as an "owner" as defined in Section 301.010(21), RSMo 1969. Furthermore, as noted above, a lessee may be issued a certificate of registration and appropriate license plates upon compliance with those requirements outlined in the IRP compact; the lessee need not follow those procedures outlined in Sections 301.020 and 301.190, RSMo 1969, applicable only to the "owners" of vehicles.

We now consider the Uniform Vehicle Registration Proration and Reciprocity Agreement (Uniform Agreement). In contrast to the IRP, the Uniform Agreement does not establish particular registration procedures, but merely suggests that a vehicle properly registered in a contracting state shall be exempt from registration and payment of fees in each other contracting state.

Article 2, Section 17 defines registration as follows:

"Registration shall mean the registration of a vehicle and the payment of annual fees and taxes as set forth opposite the name of each contracting State in the appendix hereto."

Article 2, Section 18 defines proration of registration as follows:

"Proration of registration shall mean registration of fleets of commercial vehicles in accordance with Article 4 of this agreement."

Article 3, Section 34, provides that:

"This agreement shall not authorize the operation of a vehicle in any contracting

Mr. James R. Spradling

State contrary to the laws or regulations thereof, except those pertaining to registration and payment of fees; and with respect to such laws or regulations, only to the extent provided in this agreement."

Moreover, paragraph 12 of the Revised Appendix, State of Missouri, adopted January 7, 1974, specifically states:

"Further, the State of Missouri desires to make clear that this agreement:

* * *

"(c) Does not waive the prerequisites to securing Missouri license."

The remaining sections pertain only to the apportionment of fees and do not outline any registration procedures to be followed by applicants.

It is apparent that the framework of the Uniform Agreement indicates that an owner or operator of a motor vehicle must have in his possession a valid and legal registration certificate or other evidence of proper registration issued for such vehicle by the state or other jurisdiction in which it is based pursuant to state statutes. Although the Agreement expressly states that the base jurisdiction does not recover the full registration fees, the Agreement does not establish registration procedures deviating from or otherwise exempting applicants from state registration procedures.

Therefore, it is our opinion that, in the absence of language indicating the establishment of contrary procedures and the express language of paragraph 12 of the Revised Appendix, an applicant registering pursuant to the Uniform Agreement properly and duly registers a fleet vehicle in Missouri by complying with all applicable Missouri registration requirements. In complying with the state registration statutes, the applicant thereby complies with the terms of the reciprocal agreement. In this case, an applicant must apply for and be granted a certificate of ownership (title) "as the owner" pursuant to Section 301.190, RSMo 1969, and otherwise comply with all pertinent procedures so as to be entitled to a base license plate.

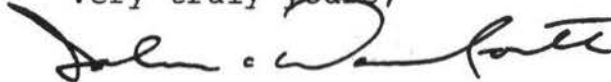
CONCLUSION

From the foregoing considerations, it is the opinion of this office that (1) the Missouri Department of Revenue may register

Mr. James R. Spradling

a motor vehicle in the name of the lessee of such vehicle and issue base license plates therefor without issuing a certificate of ownership (title) for such motor vehicle if such motor vehicle is otherwise properly and duly registered pursuant to the IRP; (2) however, the Missouri Department of Revenue may not register and issue base license plates for a motor vehicle without first issuing a certificate of ownership if such motor vehicle is registered pursuant to the Uniform Vehicle Registration Proration and Reciprocity Agreement.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

August 19, 1975

OPINION LETTER NO. 187

Honorable George W. Lehr
State Auditor
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Lehr:

This letter is in response to your request for an opinion of this office in which you inquired if circuit clerks in third and fourth class counties are required to turn over to the county treasury fees collected for issuance of United States passports.

Federal regulations authorize circuit clerks to execute applications for passports and charge a fee for the service. 22 C.F.R. §§ 51.21 and 51.61.

Section 50.334, RSMo, states, in part:

"1. In all counties having a population of less than five hundred thousand and an assessed valuation of less than three hundred million dollars, the recorder of deeds, the circuit clerk, the circuit clerk-ex officio recorder of deeds, or the clerk of court of common pleas, as the case may be, shall receive as total compensation for all services performed by him an annual salary which shall be computed on a combination population-assessed valuation basis as set forth in the following schedule: . . ."

Enclosed is a copy of Opinion No. 88, Parker, January 19, 1970, in which this office, among other things, expressed its view that the provisions of Section 50.334, RSMo, precluded a circuit clerk from retaining a fee for collecting bar enrollment fees.

Honorable George W. Lehr

It is our view that the reasoning of that opinion is applicable to this question. In Opinion No. 88 we stated:

" . . . Unquestionably, the legislature has the right to govern the salary of such clerks; and in enacting the total compensation provisions contained in Section 50.334, the legislature clearly intended that such clerks not retain any other compensation paid to them in their official capacity. . . ."

It is our view that any fee received by a circuit clerk for passport issuance is a fee received in his official capacity for performing an official duty. Therefore, this fee must be accounted for and turned over to the county treasury pursuant to Section 50.360, RSMo.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 88
1-19-70, Parker

ARRESTS:
SUNSHINE LAW:

Where the necessary preconditions
have occurred, § 610.100 and § 610.
105, RSMo Supp. 1973, require that

the appropriate law enforcement agencies, on their own initiative, must close or expunge the records relating to arrest, detention or confinement. The issuance of an injunction or other court order is not a prerequisite to the closing or expunging of such records.

OPINION NO. 188

October 15, 1975

Honorable J. Anthony Dill
State Representative, District 102
7723 Ravinhill Drive
St. Louis, Missouri 63123



Dear Representative Dill:

This official opinion is issued in response to your request for an interpretation of § 610.100 and § 610.105, RSMo Supp. 1973, the so-called "arrest records" portion of Missouri's Sunshine Law. These sections require the closing or expungement of all records of arrest, detention and confinement where certain contingencies exist. In a nutshell, your question asks whether these sections place an affirmative duty upon law enforcement agencies to close or expunge the appropriate records when the preconditions have been met, or whether the individuals affected must obtain a court order to enforce the provisions of these sections. You explain:

"A constituent reports having been charged with the alleged commission of a misdemeanor in 1974. The charge was subsequently dismissed upon payment of costs by a magistrate court in St. Louis County. A year has passed since the date of dismissal. The office of the St. Louis County Prosecuting Attorney advises that it will not expunge or close its records regarding the charge unless the person charged retains an attorney to file a motion with the court directing the prosecutor's office and the police department to expunge or close the arrest record.

"Such a requirement poses a substantial financial burden to the individual. In many cases, such individuals are indigent and have

Honorable J. Anthony Dill

no financial resources with which to retain an attorney to proceed with such a motion."

Section 610.100, RSMo Supp. 1973, reads as follows:

"If any person is arrested and not charged with an offense against the law within thirty days of his arrest, all records of the arrest and of any detention or confinement incident thereto shall thereafter be closed records to all persons except the person arrested. If there is no conviction within one year after the records are closed, all records of the arrest and of any detention or confinement incident thereto shall be expunged in any city or county having a population of five hundred thousand or more."
(Emphasis added).

Section 610.105, RSMo Supp. 1973, states:

"If the person arrested is charged but the case is subsequently nolle prossed, dismissed, or the accused is found not guilty in the court in which the action is prosecuted, official records pertaining to the case shall thereafter be closed records to all persons except the person arrested or charged." (Emphasis added).

Section 610.030, RSMo Supp. 1973, states:

"The circuit courts of this state shall have the jurisdiction to issue injunctions to enforce the provisions of sections 610.010 to 610.030 [which deal with open meetings, records and votes] and 610.100 to 610.115."
(Emphasis added).

We first observe that § 610.100 and § 610.105 are couched in mandatory language; that is, these sections repeatedly use the word "shall", which is mandatory, as opposed to the word "may", which is permissive. State v. Paul, 437 S.W.2d 98, 101-102 (St. L.Ct.App. 1969). Furthermore, we note that both § 610.100 and § 610.105 unequivocally state that when certain contingencies exist, the pertinent records "shall thereafter be closed. . ." These sections do not state that the records "shall thereafter be closed. . . upon appropriate court order" or words to that effect.

Honorable J. Anthony Dill

Although § 610.030 empowers circuit courts to enforce the provisions of § 610.100 and § 610.105 by injunction, we do not believe that this section makes the issuance of an injunction or other court order a prerequisite to the operation of § 610.100 or § 610.105. Indeed, § 610.030 also vests circuit courts with jurisdiction to issue injunctions to enforce the provisions of § 610.010 to § 610.030. These sections provide, in essence, that all public meetings shall be open to the public and that public votes and records shall be open to the public. If the existence of an injunction were held to be a prerequisite to the implementation of § 610.100 and § 610.105, the same result would logically follow with respect to the operation of §§ 610.010, 610.015 and 610.020. Such a result, needless to say, would be completely absurd, and, would, in effect, emasculate Missouri's Sunshine Law. It is well settled that a statute should be given a construction which will not cause an unreasonable or absurd result. State ex rel. Dravo Corp. v. Spradling, 515 S.W.2d 512, 517 (Mo. 1974).

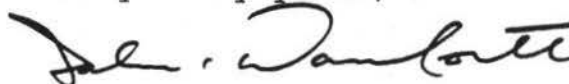
Finally, it should be emphasized that circuit courts of this state, relying on their general equity powers rather than any specific statutory provision, have for many years ordered the expungement of criminal records in certain situations. Thus, to construe § 610.100 and § 610.105 so as to make a court order a prerequisite to their operation, would render these sections unnecessary and virtually meaningless. It will not be assumed that the legislature intended to do a meaningless act. State ex rel. Thompson-Stearns-Roger v. Schaffner, 489 S.W.2d 207, 212 (Mo. 1973). Thus, a construction which would render a statute redundant and superfluous should be avoided if possible. In Re Estate of Hough, 457 S.W.2d 687, 692 (Mo. 1970).

CONCLUSION

It is, therefore, the opinion of this office that where the necessary preconditions have occurred, § 610.100 and § 610.105, RSMo Supp. 1973, require that the appropriate law enforcement agencies, on their own initiative, must close or expunge the records relating to arrest, detention or confinement. The issuance of an injunction or other court order is not a prerequisite to the closing or expunging of such records.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Philip M. Koppe.

Very truly yours,



JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

August 19, 1975

OPINION LETTER NO. 192

Dr. Arthur L. Mallory
Commissioner
State Department of Elementary
and Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Commissioner Mallory:

In accordance with your request of August 6, 1975, we have reviewed the Missouri State Department of Elementary and Secondary Education's "Application for Federal Assistance - Migrant Education Program (fiscal year 1976)." This application is being submitted under Title I of the Elementary and Secondary Education Act of 1965, P.L. 89-10, as amended. See 20 U.S.C. Section 241e(c)(1).

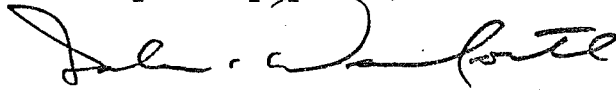
In addition to the Elementary and Secondary Education Act of 1965, as amended, and the regulations propounded pursuant thereto (45 C.F.R. 116, October 1, 1974 edition), our review has taken into consideration Article III, Section 38(a), Missouri Constitution, and Section 161.092, RSMo 1973 Supp.

Based on the foregoing, we hereby certify that the Missouri State Department of Elementary and Secondary Education has authority under state law to perform the duties and functions of a "state educational agency" as defined in Title I of Public Law 89-10 (20 U.S.C. Section 244), including those arising from the assurances set forth in the application.

Dr. Arthur L. Mallory

This opinion letter constitutes our official certification and should be inserted in the appropriate place in each copy of the application.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a distinct "D".

JOHN C. DANFORTH
Attorney General

September 10, 1975

OPINION LETTER NO. 193
Answer by Letter - Klaffenbach

FILED
193

Mr. Lawrence L. Graham
Director, Department of
Social Services
Broadway State Office Building
Jefferson City, Missouri 65101

Dear Mr. Graham:

This letter is in answer to your questions stated as follows:

"1. Are volunteers participating in programs conducted by the Division of Probation and Parole entitled to Workmen's Compensation coverage while performing their volunteer duties?

"2. Are volunteers participating in programs conducted by the Division of Youth Services entitled to Workmen's Compensation coverage while performing their volunteer duties? Are volunteers working directly with juveniles under the supervision of Division of Youth Services staff personally liable for any injury to that juvenile which occurs while the juvenile is with the volunteer?

"3. Are volunteers participating in programs conducted by the Division of Corrections entitled to Workmen's Compensation coverage while performing their volunteer duties? Are volunteers covered by the tort defense fund under Section 105.710 RSMo. while they are performing their volunteer duties?"

Mr. Lawrence L. Graham

In answer to your questions asking whether volunteers participating in programs conducted by the Division of Probation and Parole or the Divisions of Youth Services or Corrections are entitled to Workmen's Compensation coverage while performing their volunteer duties, we are enclosing Opinion No. 136 issued in 1973, which we believe answers your questions.

In answer to your question asking whether volunteers working directly with juveniles under the supervision of Division of Youth Services staff are personally liable for any injury to that juvenile which occurs while the juvenile is with the volunteer, we believe that the question is too broad to be answered properly and must therefore decline to answer such question.

In answer to your question asking whether volunteers of the Division of Corrections are covered by the tort defense fund under § 105.710, RSMo while they are performing their volunteer duties, we believe that your question is answered by Opinion No. 136 in 1973, and that, generally speaking, such volunteers would be covered.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 136
4/4/73, Shulimson



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

September 16, 1975

OPINION LETTER NO. 194

Dr. Jack L. Cross
Commissioner of Higher Education
Department of Higher Education
600 Clark Avenue
Jefferson City, Missouri 65101

Dear Dr. Cross:

This letter is in response to your question asking:

"In light of RSMo. (Supp '73), Section 181.065, may the Coordinating Board for Higher Education authorize the State Library to assume the duties toward Missouri's blind and physically handicapped presently conducted by the St. Louis Public Library, and may the Board seek funds to operate the amended program in futuro rather than by reimbursement as is presently being done."

Section 181.065, RSMo Supp. 1973, as amended in 1974, authorizes the General Assembly to appropriate monies to reimburse any public library in this state for its actual cost of furnishing library service to blind and physically handicapped citizens as defined by federal law if such library is designated by the Library of Congress as a regional library for service to the blind in order to qualify for payments under the federal law.

You have informed this office that the State Library is not now a public library authorized to receive such state or federal funds for such purposes because it has not been so designated by the Library of Congress. We gather from your question however that the issue is not whether the State Library may receive such

Dr. Jack L. Cross

federal funds but whether the State Library may perform the services to the blind and disabled now performed by the St. Louis Public Library under this section.

Section 181.021, RSMo, authorizes the Missouri State Library, among other things, to:

"(8) Purchase library materials and circulate the material by all means necessary, . . ."

It therefore appears that the State Library may furnish library materials to the blind and physically disabled because it has the general power to do so, within the limits of its appropriations.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

COURTS:
COUNTIES:
COUNTY COURTS:
CIRCUIT COURTS:

A circuit court judge who was sued in the United States District Court on a matter directly connected with his judicial function as a Missouri circuit court judge, has the author-

ity to appoint private counsel to represent him in the United States District Court and to order the payment of a reasonable and proper sum for the services of such counsel to be paid by the county.

OPINION NO. 196

September 23, 1975

Mr. Donald Barnes
Assistant Prosecuting Attorney
Pettis County
202 West 4th Street
Sedalia, Missouri 65301



Dear Mr. Barnes:

This opinion is in answer to your question asking:

"Does the County Court of Pettis County have authority to, or may it in its discretion pay legal fees incurred by the Circuit Judge of Pettis County in his defense against a suit brought against him and the Prosecuting Attorney, Circuit Clerk and Sheriff of Pettis County in the U.S. District Court by persons under criminal charges in Pettis County, Missouri wherein the issues relate to the constitutionality of the statutes under which criminal charges were brought and damages for violation of constitutionally protected rights. (The suit was dismissed as against the Circuit Judge on the basis of judicial immunity)."

You also state that:

"A Pettis County, Missouri Grand Jury brought an indictment against Baker Protective Services, Inc. (Wells-Fargo) and other individuals under Sec. 562.190 R.S.Mo. arising out of the Ozark Music Festival occurring at the

Mr. Donald Barnes

State Fair grounds in July, 1974. Defendants brought an action in the U.S. District Court for the Western District of Missouri, Case No. 74-CV 205C to enjoin the Prosecuting Attorney of Pettis County, the Sheriff of Pettis County, the Circuit Clerk and Circuit Judge of Pettis County from processing the indictment and bringing defendants to trial alleging the statute to be unconstitutional.

"The Circuit Judge of Pettis County retained Kenneth Romines, a member of the Pettis County Bar to represent him in the matter. Mr. Romines submitted a statement to the Circuit Judge for his services in the matter, and the Circuit Judge has submitted the same to the County Court of Pettis County with a request that the same be paid to Mr. Romines by the County Court."

The case of State ex rel. Crow v. City of St. Louis, 73 S.W. 623 (Mo. 1903) has been called to our attention. In that instance the Missouri Supreme Court held that the city had the authority to indemnify a police officer from loss arising out of a suit against him because of an accidental shooting occurring in the course of his employment. We do not regard that case as solid authority in this instance inasmuch as the city involved was a charter city and the Missouri Legislature has provided specific indemnification of certain state officers, not including the judiciary, under the tort defense fund, § 105.710, RSMo Supp. 1973.

We note, however, in State ex rel. Gentry v. Becker, 174 S.W.2d 181 (Mo. 1943), and in later cases, the Missouri Supreme Court held, l.c. 183, that the courts have inherent power to incur reasonably necessary expenses for the holding of court and the administration of the duties of the courts, the limitation on such power being only that the expense incurred or the thing done must be necessary to preserve the court's existence and to protect it in the orderly administration of its business. While such powers have been denied administrative bodies which are not a part of the judiciary under Article V of the Missouri Constitution, (see, County of St. Francois v. Brookshire, 302 S.W.2d 1 (Mo. 1957)), there is no doubt that it is at this time well established that the circuit courts of this state do have such inherent power.

Mr. Donald Barnes

In the Gentry case, which we cited above, the court held that attorneys appointed by a circuit court judge to represent the state in a contempt proceeding were not entitled to be paid because it was deemed to be the function of an attorney to perform such a duty without compensation because he is an officer of the court. Since the Gentry holding the attitude of the court has changed regarding the duties of counsel which are required to be performed without compensation. That is, in State v. Green, 470 S.W.2d 571 (Mo.Banc 1971), the court held that the bar should no longer be required to represent indigents accused of a crime without compensation because such duties have become extremely burdensome.

Therefore, it is our view, in light of the holdings of the court in Gentry and Green, that the circuit court in such a case does have the authority to appoint private counsel to represent the court in order to preserve the integrity of the judicial system under Article V of the Missouri Constitution, and that the court may issue an order requiring the county to pay a reasonable and proper sum under § 476.270, RSMo, to such attorney for such services.

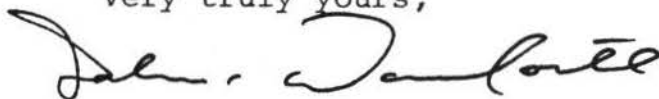
We base our views on the facts presented in this instance and the question of whether independent counsel may be so appointed in other situations must be decided on a case by case basis.

CONCLUSION

It is the opinion of this office that a circuit court judge who was sued in the United States District Court on a matter directly connected with his judicial function as a Missouri circuit court judge, has the authority to appoint private counsel to represent him in the United States District Court and to order the payment of a reasonable and proper sum for the services of such counsel to be paid by the county.

The foregoing opinion, which I hereby, approve was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH
ATTORNEY GENERAL

September 22, 1975

OPINION LETTER NO. 197



Honorable Donald L. Manford
Missouri Senate, 8th District
1000 Commerce Building
Kansas City, Missouri 64106

Dear Senator Manford:

This letter is response to your opinion request asking as follows:

"Does Mo. Constitution prohibit the passage of a statute by the General Assembly on prohibition of taxing income sources which would by such passage be retroactive in application?"

You further state in your request for an opinion that:

"Federal Rebate--Can the General Assembly either in special session yet in 1975 or during the regular session in 1976 pass a statute which would prohibit the Dept. of Revenue from taxing federal rebate as income of Missouri taxpayers for calendar year 1975?"

We do not believe that such law would violate Section 13 of Article I of the Missouri Constitution, which prohibits the enactment of a law retrospective in its operation because such a constitutional provision has no application to an enactment of a law which impairs the state's rights. Graham Paper Co. v. Gehner, 59 S.W.2d 49 (Mo.Banc 1933).

It is impossible for us to determine at this point, of course, precisely what type of legislation will be drafted for

Honorable Donald L. Manford

consideration by the Missouri General Assembly, if any, and whether such legislation will pertain to taxes due for this or for subsequent years. In any event, we believe your attention should be called to the holding in the Graham Paper Co. case, supra, in which the Missouri Supreme Court held that a law which purportedly forgave an obligation due the state violated what is now Section 39(5) of Article III of the Missouri Constitution which prevents the releasing or extinguishing of an obligation due the state. In such case the court construed the effect of a law which became effective July 3, 1927, which provided that income subject to state tax should be determined by including a reasonable proportion apportioned to this state of net income derived from business partially within and partially without the state. The income tax law prior to such amendment provided that the entire net income was subject to tax even though business was transacted partly within and partly without the state. The court held that the provisions of the law which became effective July 3, 1927, were applicable only to that portion of the year after July 3, 1927 and that the income tax for that portion of the year prior to July 3, 1927 was to be determined without regard to apportioning income from business done partially within and partially without the state. The court held that to apply the law which became effective July 3, 1927 to income "for the calendar year 1927" would violate the provisions of Section 39 (5) of Article III of the Constitution.

Therefore, while we are unable in the premises to answer your question precisely, we believe that caution dictates that the holding in the Graham Paper Co. case be reviewed to determine whether legislation should be proposed, and, if so, how such legislation should be drafted.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH
ATTORNEY GENERAL

September 24, 1975

OPINION LETTER NO. 199

Mr. C. E. Hamilton, Jr.
Prosecuting Attorney
Callaway County, Court House
Fulton, Missouri 65251

Dear Mr. Hamilton:

This letter is in response to your question asking:

"The question of law upon which we are requesting an Attorney General's opinion involves an interpretation of Chapter 114 RSMo 1969 concerning voter registration. When a registered voter resides in an area of the county which is annexed by a city subsequent to his registration, who has the responsibility to change his voting precinct on the voter registration book? Does this responsibility fall to the County Clerk, the City, or to the individual voter himself?"

You also state that:

"A voter resides in one of the rural precincts of Callaway County, Missouri. He properly registers to vote in Callaway County as a voter in that rural precinct. Subsequent to his registration, the City of Fulton annexes the area in which he lives. He continues to live in the same house but is now inside the City of Fulton and is in a Fulton city ward, rather than the rural precinct. The voter does not contact the County Clerk's office

Mr. C. E. Hamilton, Jr.

and on the registration books he is shown as a resident of a rural precinct. This voter then desires to vote in a City election. He is turned down at the polls because he is listed on the registration books as a resident of a rural district. When an area is annexed by a City, who has the responsibility for the change to be made on the registration books? Does the City have the responsibility to notify the County Clerk, does the County Clerk have the responsibility to change each person in an annexed area, or does the individual voter have the responsibility for notifying the County Clerk's office?"

Under § 114.021, RSMo Supp. 1973, the county clerk is the ex officio registration officer of the county. Under § 114.016, RSMo Supp. 1973, the voter, having once registered, is not required to register again. Under § 114.116, RSMo Supp. 1973, election precincts for that part of the county within any city, town or village, are set by the governing body of the city.

While we find no statutory provisions which directly answer your question, it is our view that the legislature intended that it is the duty of the city clerk to notify the county clerk of the new ward and precinct lines. It is also our view that it is the duty of the city clerk to ascertain which voters are to be included in the new ward or precinct lines when there is a change of boundaries because of annexation and to provide the county clerk with the names of such voters.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH
ATTORNEY GENERAL

September 30, 1975

OPINION LETTER NO. 202

Honorable Kenneth J. Rothman
State Representative, District 77
Room 309, State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Rothman:

This is in response to your request for an official opinion on the following question:

"Whether Section 11 of HB 578 passed by the General Assembly during the 1975 legislative session is broad enough to cover a child who is involved in the proceedings as required by the Federal Child Abuse Act of Public Law 93-247."

The pertinent portion of Section 11 of HB 578 reads as follows:

"In every case involving an abused or neglected child which results in a judicial proceeding the judge shall appoint a guardian ad litem to appear for and represent
a) a child who is the subject of proceedings under this act, . . ."

The Federal Child Abuse Act, Public Law 93-247, is now codified at 42 U.S.C., Section 5101, et seq. Section 42 U.S.C., Section 5103(b)(2)(g) provides that in order for states to be eligible for federal funds they must ". . . provide that in every case involving an abused and neglected child which results in a judicial proceeding a guardian ad litem shall be appointed to represent the child in such proceedings; . . ." We understand

Honorable Kenneth J. Rothman

that your request has been prompted by an inquiry from the Department of Health, Education and Welfare, as to whether the Missouri statute meets the federal requirement. The only material difference between the two sections is between the phrase "such proceedings" appearing in the federal statute and the phrase "proceedings under this act" appearing in HB 578. We view the thrust of the inquiry then as whether there can be judicial proceedings involving child abuse and neglect without the child being the subject of proceedings under HB 578.

The determination of this question turns upon the definition of the term "proceedings". The Missouri Supreme Court has provided the following definition.

"A 'proceeding' in a civil action is an act necessary to be done in order to attain a given end. It is a prescribed mode of action for carrying into effect a legal right, . . ." City of St. Louis v. Cooper Carriage Woodwork Co., 216 S.W. 944, 948 (Mo. 1919).

While this definition speaks only of a proceeding in a civil action, we recognize that the term "proceeding" has applicability to administrative matters. However, it is our belief that the basics of the definition remain the same. In Friel v. Alewel, 298 S.W. 762 (Mo. 1927), the court dealt with the phrase "proceeding under power of sale to foreclose a mortgage or deed of trust." The court defined proceeding as ". . . a course of action or procedure, resulting in competent, orderly, and continuous steps of procedure until the power of sale has been fully exercised in accordance with the statutes appertaining thereto." Id. at 764. Combining these two definitions we believe that one arrives at that definition formulated by the Supreme Court of Maine in Kennie v. City of Westbrook, 254 A.2d 39, 43 (Me. 1969), in which it was held that proceeding is a comprehensive term which generally means a proscribed course of action for enforcing legal rights and remedies. Thus, we feel that the term proceeding implies, 1) a degree of formality in the procedural steps, 2) the purpose of enforcing legal rights or remedies, and 3) that these procedural steps should lead to the accomplishment of some definite end.

Examining HB 578 in light of this definition we reach the conclusion that there are no proceedings under HB 578. HB 578 does not create any legal rights, does not create any remedies and does not provide for the Division of Family Services to reach any ultimate decision. HB 578 only imposes a duty on specified individuals to report suspected cases of child abuse

Honorable Kenneth J. Rothman

or neglect. It further requires the Division of Family Services to investigate these reports and in turn report to the juvenile officer and law enforcement officials. Other provisions of HB 578 merely relate to the execution of these two primary purposes. It is our opinion that neither the reporting nor investigative activities can be deemed "proceedings".

Thus, we have a situation in which the language of Section 11 is contradictory of the earlier provisions of HB 578, in that the preceding sections make absolutely no provision for any sort of proceedings. Under these circumstances we feel it is appropriate to apply the rule announced in City of Joplin v. Joplin Waterworks Company, 386 S.W.2d 369 (Mo. 1965).

"... Acting on the presumption that the legislature never intends to enact an absurd law, incapable of being enforced, and on the principle that the reason of the law should prevail over the letter of the law, courts on numerous occasions, confronted with ambiguous or contradictory language, have adopted a construction which modifies the literal meaning of the words, or in extreme cases have stricken out words or clauses regarded as improvidently inserted, in order to make all sections of a law harmonize with the plain intent or apparent purpose of the legislature." Id. at 373-374.

Application of this rule results in the phrase "under this act" being mere surplusage. Deleting this phrase from Section 11 results in that section now requiring that in all judicial proceedings involving child abuse the court must appoint a guardian ad litem for a child who is the subject of proceedings. When read in this manner, we believe that Section 11 now meets the requirements imposed by the federal legislation.

We recognize that it cannot be presumed that the legislature intended to use superfluous or meaningless words in the statute. Welborn v. Southern Equipment Company, 386 S.W.2d 432 (St.L.Ct. App. 1964). We do not, however, adopt the above interpretation lightly but rather feel that due to compelling reasons this is an "extreme" case and that this interpretation is necessary to harmonize with the plain intent and purpose of the legislature. See City of Joplin v. Joplin Waterworks Company, supra.

The primary purpose of the statutory construction is to ascertain and to effectuate legislative intent. Missouri Pacific

Honorable Kenneth J. Rothman

Railroad Company v. Kuehle, 482 S.W.2d 505 (Mo. 1972); State ex rel. Cooper v. Cloyd, 461 S.W.2d 833 (Mo. Banc 1971). We believe that the intent of HB 578 is clearly and unequivocally expressed by the emergency clause contained in Section A:

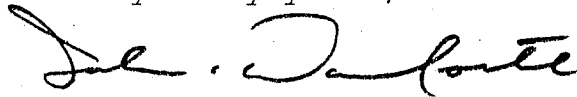
"Because immediate action is necessary in order to prevent certain federal funds from being cut off from payment to the State of Missouri and because there are available other federal funds if this act is passed, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the Constitution, and this act shall be in full force and effect upon its passage and approval."

Therefore, the legislature clearly contemplated that passage of HB 578 would render the State of Missouri eligible for federal funds. To be eligible, Missouri law must be in compliance with the federal statute, i.e., must provide for the appointment of a guardian ad litem in all judicial proceedings involving child abuse. The emergency clause of HB 578 is a clear demonstration that the legislature intended to meet this federal requirement in Section 11.

Further, examination of the term "proceedings" in context compels the same result. The term is used in previous sections of HB 578. See Sections 4.2, 6, 7 and 9.1. An examination of the use of the term in these sections reveal that the legislature did indeed use the term in the sense of a formalized decision-making process regarding legal rights.

It is our opinion, therefore, that the proper construction of HB 578 is that it requires the appointment of a guardian ad litem for the child in every judicial proceeding involving an abused or neglected child.

Very truly yours,



JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

October 21, 1975

OPINION LETTER NO. 204

Mr. J. Neil Nielsen
Commissioner
Office of Administration
Post Office Box 809
Jefferson City, Missouri 65101

Dear Mr. Nielsen:

This letter is in response to your request for an opinion of this office concerning the following question:

"Is a Regional Planning Commission which changes its name from that specified in Chapter 251.034 RSMo 1973 Cumulative Supplement still eligible for state funds in accordance with that Chapter?"

You further state:

"Chapter 251.034 RSMo 1973 Cumulative Supplement provides for distribution of state funds to Regional Planning Commissions. Since enactment of this section three of these regions have changed their bylaws to reflect a name change as follows:

"1. Lake of the Ozarks Regional Planning Commission to Lake of the Ozarks Council of Local Governments.

"2. Lakes Country Regional Planning Commission to Southwest Missouri Local Government Advisory Council.

Mr. J. Neil Nielsen

"3. Mid-Missouri Regional Planning Commission to Mid-Missouri Council of Governments.

"The original constitution of these regional commissions (boundaries, commission memberships, services, goals, etc.) remain basically unchanged except for this name change."

Section 251.034, RSMo Supp. 1973, provides:

"Payments made under sections 251.032 to 251.038 to the various regional planning commissions shall be distributed on a matching basis of one-half state funds for one-half of local funds. No local unit shall receive any payment without providing the matching funds required. The state funds so allocated shall not exceed the sum of sixty-five thousand dollars for the East-West Gateway Coordinating Council and for the Mid-America Regional Council or twenty-eight percent of the funds appropriated for such purpose to be divided equally among those planning commissions for regions containing seven hundred thousand or more inhabitants based on the last completed decennial census, whichever sum is the lesser. The remaining allocated state funds shall not exceed the sum of twenty-five thousand dollars for each of the following regional planning commissions: South Central Ozark, Ozark Foothills, Green Hills, Show-Me, Bootheel, Missouri Valley, Ozark Gateway, Mark Twain, ABCD, Southeast Missouri, Boonslick, Northwest Missouri, Mid-Missouri, Kaysinger Basin, Lake of the Ozarks, Meramec, Northeast Missouri, and Lakes Country or seventy-two percent of the total funds appropriated for that purpose, divided equally, to those planning commissions for regions containing less than seven hundred thousand inhabitants, whichever sum is the lesser."

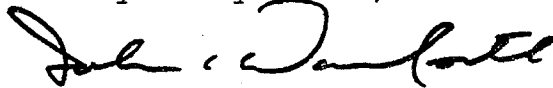
It is clear on reading Section 251.034, RSMo Supp. 1973, that the sole purpose of this statute is to provide the terms and method of allocation of state funds to the several regional planning commissions. Although the statute does mention each such commission by name, it is our view that the names were used

Mr. J. Neil Nielsen

only for the purpose of clarifying the method of allocation of payments made under Sections 251.032 to 251.038, RSMo Supp. 1973. The names set out in the statute were the names in existence at the time the statute was enacted. We find no indication that the General Assembly intended to condition the receipt of state funds by regional planning commissions on the continuation of any specific name. The funding of the several commissions, and not the names by which they may be known, was the concern of the General Assembly in enacting Section 251.034.

Accordingly, it is the opinion of this office that a regional planning commission which changes its name from that specified in Section 251.034 remains eligible for state funds in accordance with Chapter 251.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

December 19, 1975

OPINION LETTER NO. 205
Answer by Letter - Klaffenbach

Mr. Milt Harper
Prosecuting Attorney
Boone County, Courthouse
Columbia, Missouri 65201



Dear Mr. Harper:

This letter is in response to your question in which you ask as follows:

"Are the Circuit Clerk's records public, with no discretion, upon filing of a civil suit or when the defendant is served?"

Obviously not all circuit court records are public since there are certain statutory exceptions such as those concerning juvenile court records as contained in Chapter 211, RSMo. However, we are of the view that in the absence of a statutory exception or in the absence of an exception lawfully imposed by a court in furtherance of its jurisdiction the records of the circuit clerk are public records and therefore open to public inspection. See Section 109.180, RSMo.

As to your precise question concerning whether the record is an open record at the time service is made or at the time the civil suit is filed, it is our view that the record becomes an open and public record at the time the suit is filed. Supreme Court Rule 53.01 provides that an action is commenced when the petition is filed with the court. See State ex rel. Kincannon v. Schoenlaub, 521 S.W.2d 391 (Mo.Banc 1975) in which the court recognized this rule.

Therefore, in direct answer to your question, civil petitions filed with the circuit clerk are with some exceptions open public records.

Mr. Milt Harper

In answering your question, we have not attempted to detail the exceptions to the rule that may exist since such can be done only on a case by case basis.

Very truly yours,

JOHN C. DANFORTH
Attorney General

October 15, 1975

OPINION LETTER NO. 207
Answer by letter-Mansur

Honorable Edward C. Graham
Prosecuting Attorney
Mississippi County
107 East Commercial Street
Charleston, Missouri 63834



Dear Mr. Graham:

This is in response to your request for an opinion from this office as follows:

"Is there a violation of the nepotism provision of the Constitution, Art. VII, Section 6, when a County Collector employs a former sister-in-law who had a son by the said former marriage, but who is now remarried to a person not related to the County Collector?"

It is not stated whether the former marriage has been dissolved by death or divorce.

Article VII, Section 6, Constitution of Missouri, 1945, provides as follows:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

Section 52.010, RSMo, provides for the election of the county collector in each county of this state except counties under township organization and shall hold such office for a term of four

Honorable Edward C. Graham

years and until a successor is duly elected and qualified. It is our opinion that he is a public officer within the provisions of the above-constitutional provision. It is also our opinion that a sister-in-law of the public officer is a relative within the fourth degree by affinity under the above-constitutional provision and the only question is whether that relationship continues after dissolution either by death or divorce of the spouse.

We are unable to find any appellate court decisions in this state directly passing upon this issue. In 2A C.J.S. Affinity p. 514, the rule is stated in part as follows:

"It is an ancient rule of the common law, that affinity or relationship by affinity implies or rests upon a subsisting marriage, and not a dissolved one; and that relationship by affinity ceases with the dissolution of the marriage which produced it if there are no children of the marriage; but if the marriage has resulted in issue who are still living, the relationship by affinity continues after the marriage is dissolved. In a number of cases the courts have traced the history and development of this rule, and have shown that its applicability may depend on the nature of the case, that is, on whether it involves the disqualification of a judge or juror, a prosecution for incest, the right to receive insurance, or some other aspect of the law."

Diebold v. Diebold, 141 S.W.2d 119 (Spr.Ct.App. 1940) involved the construction of a will, and one of the questions was whether the man who married the daughter of the testator should be considered as a son-in-law or whether the death of such daughter terminated the relationship by affinity between the testator and the man who married his daughter. The court in discussing this matter referred to 2A C.J.S. which states the rule that death of the spouse terminates the relationship by affinity unless the marriage has resulted in issue who are still living in which case the relationship by affinity continues. The court in discussing this rule stated, l.c. 126:

"The ancient common-law rule was laid down by no less authority than Lord Coke, as follows: 'That the marriage must continue or issue be had to continue the affinity'.

Honorable Edward C. Graham

(Coke 157 a). The rule thus stated, so far as we have been able to ascertain, has been universally recognized in every case where there was issue of the marriage in existence at the time the question arose as to whether the relationship was severed or continued. It has been directly held that, if the marriage has resulted in issue still living, the relationship by affinity continues. *Stringfellow v. State*, 42 Tex.Cr.P. 588, 61 S.W. 719; *Bigelow v. Sprague*, 140 Mass. 425, 5 N.E. 144, loc. cit. 146; *Jacques v. Commonwealth*, 10 Grat., Va., 690."

Our review of numerous court decisions reveals no cases directly in point. While it is recognized that interpretations respecting affinity in such a situation will vary according to the nature of the particular case involved, 2A C.J.S. Affinity p. 514, it seems highly probable that a court interpreting the law in these premises would find the prohibited degree of affinity to still exist because of the fact that there has been issue of the marriage. Therefore, in our view, a prudent officer would avoid such an appointment.

Yours very truly,

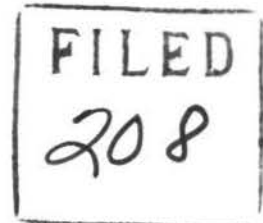
JOHN C. DANFORTH
Attorney General

SEWERS: (1) A county court which creates a sewer
COUNTY COURT: district pursuant to Sections 249.430 to
SEWER DISTRICTS: 249.667, RSMo 1969, may contract with a
private party to perform all operation,
repair, and maintenance functions associated with the district's
sewer system; (2) the existence of such a contract does not alter
or delegate the legal responsibilities of the county court for the
operation and maintenance of the sewer system under Sections 204.
006 to 204.141, RSMo Supp. 1973; (3) the county court must bill for
sewer service charges and collect such charges itself, under the
procedure set out in Section 249.640; and (4) the special tax as-
sessments issued pursuant to Sections 249.640 and 249.645 may not
be assigned to a private entity for collection.

OPINION NO. 208

October 22, 1975

Mr. James L. Wilson, Director
Department of Natural Resources
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Mr. Wilson:

This official opinion is issued in response to your request
for a ruling on the following questions:

- "1. When a county court creates a sewer district pursuant to Sections 249.430 to 249.667, RSMo 1969, may the county court contract with a non-governmental person, firm or corporation, whereby the private person or entity would perform all operation, maintenance and repair functions associated with the sewer system?
- "2. If the county court can enter into such a contract, is the county court still legally responsible under Sections 204.006 to 204.141, RSMo Supp. 1973, for the operation and maintenance of the sewer system and treatment facilities?
- "3. In the situation described in question No. 1, may the county court allow the private person or entity to directly bill sewer district

Mr. James L. Wilson

customers for monthly or yearly service charges, and keep all proceeds therefrom, or must the county court collect such service charges?

- "4. If special tax bills are issued pursuant to Sections 249.640 and 249.645, RSMo 1969, does the county court or county collector have the responsibility to collect delinquent special tax bills, or may the special tax bills be assigned to the private entity mentioned in question No. 1, for collection by said entity?"

We answer your questions as follows, in the order in which you have asked them:

1. In our Opinion No. 33, issued to the Honorable Floyd R. Gibson on May 29, 1958 (a copy of which is attached hereto), it was pointed out that Section 70.220, RSMo 1969, permits a "political subdivision"--a term which is defined in Section 70.210, RSMo 1969, to include sewer districts--to contract with any private person, firm, association, or corporation:

". . . for the planning, development, construction, acquisition or operation of any public improvement or facility, . . . provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. . . ."

The essential question posed by your first inquiry, then, is whether a county court which has created a sewer district pursuant to Sections 249.430 to 249.667, RSMo 1969, is empowered to perform all the operation, maintenance, and repair functions associated with the sewer system which serves that sewer district. If the county court has the power to perform those functions itself on behalf of the sewer district, it may contract with a private person or entity for the performance of those functions pursuant to Section 70.220.

County courts are authorized pursuant to Section 249.460, RSMo 1969, to designate a sewer engineer for the purpose of superintending the construction and maintenance of sewers. Section 249.550 authorizes such a sewer engineer:

Mr. James L. Wilson

". . . to employ such help and assistance as may be necessary for the carrying on of the maintenance, repair and administrative expenses of any sewer district or districts, as provided in sections 249.430 to 249.660, subject to the approval of the county court."

Section 249.640, RSMo 1969, provides in pertinent part as follows:

"Upon the recommendation of the sewer engineer, the county court, by resolution, shall have authority to levy a special assessment upon all lots, tracts or parcels of land, including improvements, in any sewer district established as provided in sections 249.430 to 249.660 for the maintenance, repair and administrative expense of the sewer in such sewer district or districts, . . ."

Section 249.645, RSMo 1969, also authorizes the establishment and collection of charges for sewage service, in addition to the charges which may be levied and collected for maintenance, repair, and administration expenses as provided for in Section 249.640. This provision and Section 249.640 necessarily imply, of course, that the county court may not only initially construct the sewer system, but may provide sewer services on a continuing basis.

Taking all the foregoing provisions of law into consideration, we conclude that county courts are empowered by law to perform all operation, maintenance, and repair functions associated with the sewer system of a public sewer district created pursuant to Sections 249.430 to 249.667, RSMo 1969. Therefore, they may contract with private persons or entities for the performance of those functions.

2. While Section 70.220 permits a political subdivision to contract for the operation of a public facility, neither it nor any other statute authorizes the political subdivision to delegate its own responsibilities with respect to such a facility by entering into such a contract. It is clear that the private person or entity contracting with a county court for the operation of a sewer district's sewage collection and treatment facilities is merely an agent of the county court and, absent specific statutory authorization, cannot be said to have assumed the responsibilities conferred upon the county court by Sections 249.430 to 249.667. The contractor assumes obligations only to its principal, by virtue of the specific provisions of its contract with the political subdivision (here, its contract with the county court which acts on behalf of the sewer district).

Mr. James L. Wilson

That a political subdivision is ultimately responsible for the operation of a sewer system constructed under its authority--even though the actual construction of the sewer system was undertaken by a contractor--is clear from the case of Windle v. City of Springfield, 8 S.W.2d 61 (Mo. 1928). The court there held that pollution caused by such a sewer system was the responsibility of the city under whose authority the system was constructed, and that the persons damaged by such pollution did not have to look to the contractor for their remedy.

These principles are clearly applicable by analogy to the requirements imposed upon sewer districts by the Missouri Clean Water Law, Sections 204.006 to 204.141, RSMo Supp. 1973. Insofar as the operation of a district's sewer system may be affected by this law, the principal party responsible for the establishment and operation of the sewer system--that is to say, the county court--will be held responsible under the law, notwithstanding its contractual delegation of the actual operation and maintenance of the sewer system to a private person or entity as its agent.

3. Sewage service charges under Sections 249.430 to 249.667 are governed by Section 249.645, which provides as follows:

"Any public sewer district created under the provisions of section 249.640, may establish, make and collect charges for sewage services. The charges may be based upon the amount of water supplied to the premises and shall be in addition to those charges which may be levied and collected for maintenance, repair and administration expenses as provided for in said section. Any private water company, public water supply district, or municipality supplying water to the premises located within a sewer district shall, upon reasonable request, make available to such sewer district its records and books so that such sewer district may obtain therefrom such data as may be necessary to calculate the charges for sewer service. Prior to establishing any such sewer charges, public hearings shall be held thereon and at least thirty days' notice shall be given thereof."

This provision of the law was enacted in 1969. It makes reference to Section 249.640, an earlier-enacted statute, which provides as follows:

Mr. James L. Wilson

"Upon the recommendation of the sewer engineer, the county court, by resolution, shall have authority to levy a special assessment upon all lots, tracts or parcels of land, including improvements, in any sewer district established as provided in sections 249.430 to 249.660 for the maintenance, repair and administrative expense of the sewer in such sewer district or districts, the said assessment to be levied according to the lots, tracts or parcels of real estate including improvements, as shown upon the assessment books prepared by the assessor of such county, such assessment not to exceed one-half of one percent of such assessed valuation. The county clerk shall compute the amount of such assessment against each lot, tract or parcel of real estate in such sewer district or districts and deliver a certified copy of such assessment to the county collector. The county collector shall report such assessment to anyone making inquiry about the taxes and shall receive payment therefor, and issue a duplicate receipt therefor, one of which shall be filed with the county clerk, and such payments shall be remitted to the county treasurer who shall be required to keep a separate account thereof which shall be subject to warrants drawn on said account by the county court, to be used only in the furtherance of the provisions of sections 249.430 to 249.660."

[We should note that Section 249.645 is somewhat misleading when it refers to "any public sewer district created under the provisions of section 249.640." Section 249.640 does not actually create any sewer districts; but, inasmuch as Section 249.640 does refer to "any sewer district established as provided in sections 249.430 to 249.660," we must assume that Section 249.645 actually refers to these latter sewer districts. Undoubtedly, the legislature, in enacting Section 249.645, actually meant to apply it to "any public sewer district subject to the provisions of section 249.640," and merely used the words "created under the provisions of section 249.640" inadvertently. To conclude otherwise would give the legislature's reference to Section 249.640 in Section 249.645 a meaningless or absurd construction, which is not favored in the law. State ex rel. Dravo Corporation v. Spradling, 515 S.W. 2d 512, 517 (Mo. 1974).]

Mr. James L. Wilson

While the language of Section 249.645 is perhaps not quite as clear as it might be, we view it as requiring the responsible political subdivision--that is to say, the sewer district, acting through the county court--to bill and collect service charges in the same manner in which it makes assessments for maintenance, repair, and administrative expenses of the sewer district under Section 249.640. We view the enactment of Section 249.645 as an attempt to fill a previously existing loophole in Section 249.640--the absence of a provision allowing assessments for routine sewer use charges, as distinguished from the specific maintenance, repair, and administrative expenses of the district--and not as the establishment of an entirely new procedure for the establishment, billing, and collection of sewer use charges.

Section 249.640 quite clearly requires that the county court, by resolution, levy special assessments for maintenance, repair, and administrative expenses of sewer districts. The statute sets out various specific duties of the sewer engineer, county court, county clerk, county collector, and county treasurer in the setting and collection of these assessments. It does not appear, however, that Section 70.220 confers upon the sewer district any right to contract with a private person or entity for the performance of any of these duties of assessment and collection, since Section 70.220 permits contracts with private parties only for the "planning, development, construction, acquisition, or operation" of public facilities, but not for the financial administration of such facilities. Moreover, where a statute directs the performance of certain things by specified means and specified persons, it implies that such things shall not be done otherwise nor by different persons. Parvey v. Humane Society of Missouri, 343 S.W.2d 678, 681 (St.L.Ct.App. 1961).

Therefore, we conclude that, even when a county court contracts with a nongovernmental person, firm, or corporation for the operation, maintenance, or repair of the sewer system of a sewer district, the county court must itself bill and collect the service charges for such operation of the sewer system.

4. As we indicated in the answer to the previous question, Section 249.640 mandates the performance of certain duties by county officials in the process of billing and collecting the special taxes which Section 249.640 authorizes. For this reason, we do not believe that such special tax assessments may be assigned to a private entity for collection by such entity. Moreover, we would point out that Section 249.520, subsection 4, specifically provides that certified tax bills for the construction of district

Mr. James L. Wilson

sewers shall be assignable. But no such provision appears in Section 249.640 with respect to the special assessments therein authorized for maintenance, repair, and administrative expenses, nor is there any such provision authorizing assignment of special assessments for the sewage service charges authorized by Section 249.645.

Section 249.650, which pertains to suits for the collection of tax bills, does not in itself authorize the assignment of such bills. It provides as follows:

"Suits to collect any tax bills herein authorized may be brought in any court of competent jurisdiction by the person to whom issued or any assignee in their own names. Every such certified tax bill shall, in an action brought to recover the amount thereof, be prima facie evidence of the validity of the charges against the property therein described; and where suit is brought before the liens have expired, said liens shall continue until the termination of such suits and the satisfaction of the judgments."

The language "any tax bills herein authorized" in this statute appears to apply only to tax bills issued pursuant to Section 249.520, subsection 2. Similar language ("all special tax bills provided for by sections 249.430 to 249.660") used in Section 249.580 clearly refers only to such tax bills which are issued directly to contractors. (Section 249.580 sets out a specific procedure for the preparation of such bills.) Section 249.640 uses the term "special assessment," not "tax bill," to refer to taxes for maintenance, repair, and administrative expenses of sewer districts. Section 249.600, RSMo, distinguishes between "special tax bills" and "special assessments." Thus, when Section 249.650 speaks of "any assignee," it refers only to assignees of the special tax bills issued under Section 249.520 and does not purport to empower a county court to assign special assessments created under Sections 249.640 and 249.645.

We must, therefore, conclude that the assignment of special tax assessments issued pursuant to Sections 249.640 and 249.645 to a private entity is not authorized by law.

CONCLUSION

Therefore, it is the opinion of this office that: (1) a county court which creates a sewer district pursuant to Sections 249.430 to 249.667, RSMo 1969, may contract with a private party to

Mr. James L. Wilson

perform all operation, repair, maintenance functions associated with the district's sewer system; (2) the existence of such a contract does not alter or delegate the legal responsibilities of the county court for the operation and maintenance of the sewer system under Sections 204.006 to 204.141, RSMo Supp. 1973; (3) the county court must bill for sewer service charges and collect such charges itself, under the procedure set out in Sections 249.640; and (4) the special tax assessments issued pursuant to Sections 249.640 and 249.645 may not be assigned to a private entity for collection.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 33
Gibson, 5-29-58

STATE AUDITOR:
SUNSHINE LAW:
PUBLIC RECORDS:
PUBLIC MEETINGS:

Raw files, work papers, and other documents and meetings held preparatory to the issuance of signed audit reports of the State Auditor issued pursuant to Section 29.270, RSMo 1969, shall not be open to the public.

OPINION NO. 209

October 20, 1975

Honorable George W. Lehr
State Auditor
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Lehr:

This opinion is in response to your request as stated:

- "1. Are the raw files, work papers, and other documents, or meetings, relating to a particular audit required to be open to the public prior to release of a signed audit report?
- "2. If the answer to question No. 1 is "no," is there any change in the status of raw files, work papers, and other documents, relating to a particular audit, after issuance of the signed audit report."

It is our understanding that the auditing work of your office culminates with the issuance of formal audit reports as required in Section 29.270, RSMo 1969. Preparatory to the issuance of these audit reports, preliminary investigations are conducted by examiners who are employed by your office. These preliminary investigations include the accumulation of raw files, preparation of work papers and other documents, and the holding of intra-office meetings and meetings with officials of the offices being audited. You have asked whether these materials and meetings must be open to the public either before or after the formal audit report is signed and issued. For the reasons stated herein, it is the conclusion of this office that such materials and meetings may not be made available for public inspection.

As a general rule, the degree of public inspection authorized for the meetings and records of governmental bodies is governed by

Honorable George W. Lehr

the so-called "Sunshine Law" found in Chapter 610, RSMo Supp. 1973. Clearly, the office of the State Auditor is a "public governmental body" within the meaning of Section 610.010(2) of the Sunshine Law.

Section 610.025.5 states that meetings and records of governmental agencies are to be closed, despite the general principle of disclosure mandated by the Sunshine Law, if such closing is provided for in other sections of the statutes. Specifically, Section 610.025.5, RSMo, states:

"Other meetings, records or votes as otherwise provided by law may be a closed meeting, closed record, or closed vote."

It is the opinion of this office that records and meetings of the State Auditor do fall within this exception of the Sunshine Law, and that the degree of public access to such records and meetings is governed by Chapter 29 relating to the operation of the office of State Auditor. The scheme of Chapter 29 is that final audit reports are public documents, but that material gathered by your office in preparation for the issuance of such final reports is not to be open to the public.

Section 29.270 directs that you issue audit reports of your examinations to appropriate state and county officials. That section also states that ". . . All audit reports and reports of examinations made by the state auditor shall be made a matter of public record. . . ." Thus, it is clear from the express language of the statute that final audit reports issued by your office must be open to public inspection. However, Chapter 29 demonstrates an equal intention by the General Assembly that preliminary material compiled in preparation for such final reports must not be open to the public.

Section 29.070 provides, in part, that examiners employed by you must be discrete and impartial, and that they must not ". . . reveal the condition of any office examined . . . or any information secured in the course of any examination . . . to anyone except the state auditor, . . ."

In its entirety, Section 29.070 states:

"Every examiner appointed by the state auditor shall, before entering upon the duties of his appointment, take and file in the office of the secretary of state an oath to support the constitution of the state, to

Honorable George W. Lehr

faithfully demean himself in office, to make fair and impartial examinations, and that he will not accept as presents or emoluments any pay, directly or indirectly, for the discharge of any act in the line of his duty other than the remuneration fixed and accorded to him by law, and that he will not reveal the condition of any office examined by him or any information secured in the course of any examination of any office to anyone except the state auditor, and every examiner shall enter into a bond, payable to the state of Missouri, in the sum of ten thousand dollars, to be approved by the state auditor and deposited in the office of the state treasurer conditioned that he will faithfully perform his duties as such examiner, and in case any such examiner shall knowingly report any officer as being a defaulter or as not being a defaulter, and knowing the same to be otherwise, and any person be injured thereby, such person shall have a right of action on such bond for his injuries; such action shall be brought in the name of the state and at the relation of the injured party."

Section 29.080 provides that:

"For any violation of his oath of office or of any duty imposed upon him by this chapter, any examiner shall be guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary for a term not exceeding five years, or by a fine not less than one hundred dollars or by imprisonment in the county jail for not less than one nor more than twelve months, or by both such fine and imprisonment."

Therefore, it is our view that the General Assembly took great care to provide for publicity of final audit reports, but that it was highly sensitive to the impropriety of disclosing preliminary information which may or may not find its way into final audit reports. Indeed, an employee of your office who reveals such information is guilty of a felony and subject to imprisonment of a term up to five years. We are confident that the General Assembly did not intend the Auditor, himself, to make public preliminary information which, if released by an employee of the Auditor, would be punishable

Honorable George W. Lehr

by a term in the penitentiary. The whole thrust of Chapter 29, as we see it, is to provide for the formal publication of official audits, and to provide for great care and discretion in guarding material which is not, itself, a part of the final audit.

Moreover, we note that Section 29.235.1 provides that "[a]ll audits shall conform to recognized governmental auditing practices." Although this office does not purport to have expertise in the field of "recognized governmental auditing practices," it is our general understanding that governmental auditing does entail a degree of discretion which would be the converse of the release of raw files, work papers, and other documents and the opening of meetings conducted by the Auditor and his staff.

We are unable to discern any legal distinction, for the purposes of this opinion, between the publication of such information before or after the release of a signed audit report.

CONCLUSION

It is the opinion of this office that raw files, work papers, and other documents and meetings held preparatory to the issuance of signed audit reports of the State Auditor issued pursuant to Section 29.270, RSMo 1969, shall not be open to the public.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

CORPORATIONS:

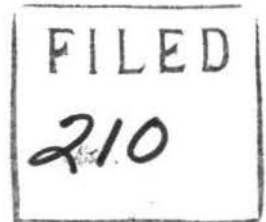
SECRETARY OF STATE:

A corporation must submit a separate annual registration report for each year the corporation was in forfeiture and a corporation must pay the maximum registration fee of \$40 for each year the corporation was in forfeiture before the forfeiture may be rescinded by the Secretary of State. Rescission restores the corporation to good standing as of the date of forfeiture, except for exceptions set forth in Section 351.540(2), Senate Bill No. 14, 78th General Assembly.

OPINION NO. 210

December 12, 1975

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This is in response to your request for an opinion on the following questions concerning rescission of a forfeiture of corporate rights:

"1. Must the Secretary of State require that the corporation submit a separate annual registration report for each year the corporation was in forfeiture?

"2. If the answer to 1 is yes, must the corporation pay the registration fee for each year?

"3. Since the annual registration report fee is on a graduated basis through December each year and assuming the report is required for each year, should the required fee be the basic fee (\$10.00) or the maximum fee (December \$40.00) for each year or fraction thereof of forfeiture prior to the year of rescission?

"4. Assuming again that the corporation must submit all previous annual reports for the years in forfeiture and pay fees therefor, will such payment be a condition precedent to the rescission?

Honorable James C. Kirkpatrick

"5. Does the rescission restore the corporation to good standing during the period it was in forfeiture?"

Section 351.525, Senate Bill No. 14, 78th General Assembly, provides:

"If any corporation:

(1) Fails to comply with the provisions of this chapter with respect to its annual registration (but not the 'first registration' required in section 351.120), or the payment of its annual franchise tax on or before the thirty-first day of December;

(2) Procures its franchise through fraud practiced upon the state;

(3) Has continued to exceed or abuse the authority conferred upon it by law, or has continued to violate any section or sections of the criminal code of the state of Missouri after a written demand to discontinue the same shall have been delivered by the secretary of state to the corporation, either personally or by mail; (If mailed, the notice shall be deemed to be delivered five days after it has been deposited in the United States registered mail in a sealed envelope addressed to such corporation at its registered office in this state.) or

(4) After written notice by the secretary of state to any officer of the corporation at his address as last known to the secretary of state, has failed for sixty days to appoint and maintain a registered agent in this state; the corporate rights and privileges of the corporation shall be forfeited, and the secretary of state shall thereupon cancel the certificate, or license, of the corporation by appropriate entry on the margin of the record thereof, whereupon all the powers, privileges and franchises conferred upon the corporation by the certificate, or license, shall, subject to rescission as provided in this chapter, cease and determine; and the secretary of state shall

Honorable James C. Kirkpatrick

notify the corporation by mail, addressed to its registered office, as disclosed by the records of his office, that its corporate existence and rights in this state have been forfeited and canceled, and the corporation dissolved subject to rescission as provided in this chapter; and the directors and officers in office when the forfeiture occurs shall be the trustees of the corporation, who shall have full authority to wind up its business and affairs, sell and liquidate its property and assets, pay its debts and obligations and to distribute the net assets among the shareholders; and the trustees as such shall have power to sue for and recover the debts and property due the corporation, describing it by its corporate name, and may be sued as such; and the trustees shall be jointly and severally responsible to the creditors and shareholders of the corporation to the extent of its property and effects that shall have come into their hands."

Thus, if a corporation commits one of the enumerated acts or omissions, its corporate rights and privileges shall be forfeited.

When corporate rights are forfeited under Section 351.525(1) or Section 351.525(4), Senate Bill No. 14, 78th General Assembly, the Secretary of State may rescind the forfeiture under Section 351.540, Senate Bill No. 14, 78th General Assembly, which provides:

"The secretary of state may rescind the forfeiture of the corporate rights of any corporation, declared under the provisions of subdivisions (1) or (4) of section 351.525, upon presentation of an affidavit signed by any of the directors or officers in office when the forfeiture occurred acting in his capacity as one of and on behalf of the statutory trustees constituted under section 351.525 and a statement by the director of revenue that the corporation does not owe any state taxes and that the trustees of the corporation have filed a franchise tax report for each year in forfeiture as of the time of the application for rescission of the forfeiture, and that the trustees of the corporation have paid to the state a fee equal to the amount of

Honorable James C. Kirkpatrick

franchise taxes that were owing at the time of forfeiture and for each year of forfeiture and which would have been payable had the corporation been in good standing, including all penalties and interest which accrued prior to forfeiture or after forfeiture. The affidavit shall recite that the trustees have caused the correction of the condition or conditions giving rise to the forfeiture. At the time of such filing and the presentation of the affidavit and other required statements, the trustees shall likewise tender and pay all fees and charges, and all penalties which may have accrued. The secretary of state may demand such other and further proof as he may deem necessary before rescinding any such forfeiture. For rescinding such forfeiture there shall be paid to the state a fee of fifty dollars; provided, no such forfeiture shall be rescinded after one year from the date of its entry for less than the fees required by law for original incorporation."

Upon rescission of a forfeiture, corporate rights and privileges are restored as of the date of the forfeiture (Section 351.540(2), Senate Bill No. 14, 78th General Assembly).

The resolution of your questions depends upon whether or not Section 351.540 requires the filing of registration statements and the payment of registration fees. In this regard, the primary goal of statutory construction is to ascertain and to give effect to the legislative intent. Edwards v. St. Louis County, 429 S.W.2d 718 (Mo. Banc 1968). Effect should be given to every word, phrase, and sentence utilized in the statute. State ex rel. Taylor v. Oster, 262 S.W.2d 581 (Mo. Banc 1953).

As recognized by several jurisdictions, statutes such as Section 351.525 are primarily designed to aid in the enforcement of laws requiring registration, fee payments, and tax payments. See Sale v. Railroad Commission, 104 P.2d 38, 41 (Cal. 1940); Spector v. Hart, 139 So.2d 923, 927 (Fla.App. 1962); and Isbell v. Gulf Union Oil Co., 209 S.W.2d 762, 764 (Tex. 1948). Bearing in mind the purpose behind Section 351.525, we conclude that Section 351.540 requires the filing of registration statements and the payment of registration fees as a condition precedent to rescission of a forfeiture.

If corporate status has been forfeited for failure to comply with registration requirements (Section 351.525(1)) or for failure

Honorable James C. Kirkpatrick

to appoint and maintain a registered agent in Missouri (Section 351.525(4)), registration reports and registration fees must be filed for the years of forfeiture in order to comply with Section 351.540 (1) which requires that the trustees have caused the "correction of the condition or conditions giving rise to the forfeiture," and that the trustees file "required statements" and "tender and pay all fees."

Section 351.125 provides for an annual registration fee in a graduated amount based on the date of the corporate registration. A corporation which has failed to pay the registration fee for a year during which its corporate rights were forfeited must pay a fee of \$40 for the annual registration for that year, because December was the last month of that year in which the registration fee could have been paid.

The conclusion that the filing of registration reports for each year of forfeiture and the payment of a registration fee of \$40 for each year of forfeiture constitute condition precedents to rescission of forfeiture of corporate rights is supported further by the fact that the restoration of corporate rights and privileges is effective as of the date of forfeiture. If corporate rights and privileges are restored for each of the years of forfeiture, the corporation should be required to pay registration fees and file registration reports for each of those years. Due to statutory amendments noted in this opinion, changes in the law necessitate withdrawal of Opinion No. 40, Spradling, March 1, 1973, and Opinion No. 317, Kirkpatrick, September 29, 1970.

Lastly, in regard to your final question concerning restoration of corporate good standing, it is our view that the question is resolved by Section 351.540(2), Senate Bill No. 14, 78th General Assembly, which provides:

"Upon the issuance of a certificate rescinding the forfeiture of the corporate rights of a corporation, the restoration of corporate rights and privileges shall have effect from the date of the forfeiture, and all acts of the corporation, in the period between the date of forfeiture and the date of the rescission of the forfeiture shall be thereby confirmed and held as the acts of the original corporation; except that, any judgment obtained against any person in his capacity as a trustee under section 351.525 shall not be vacated by reason of any rescission under this section, but shall continue in full force and

Honorable James C. Kirkpatrick

effect notwithstanding the rescission. No corporation shall prosecute any action enumerated in section 351.535 following a rescission under this section if the action was filed after the forfeiture of the corporation's corporate rights but prior to the rescission of that forfeiture."

Thus, upon rescission of forfeiture, corporate good standing relates back to the date of the forfeiture, except that judgments against trustees are not vacated and the rescission does not retroactively validate filing of actions in violation of Section 351.535, RSMo 1969, which prohibits corporations under forfeiture from maintaining action for collection of bills or enforcement of contracts.

CONCLUSION

It is the opinion of this office that a corporation must submit a separate annual registration report for each year the corporation was in forfeiture and a corporation must pay the maximum registration fee of \$40 for each year the corporation was in forfeiture before the forfeiture may be rescinded by the Secretary of State. Rescission restores the corporation to good standing as of the date of forfeiture, except for exceptions set forth in Section 351.540(2), Senate Bill No. 14, 78th General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my assistants, B. J. Jones and W. Mitchell Elliott.

Yours very truly,

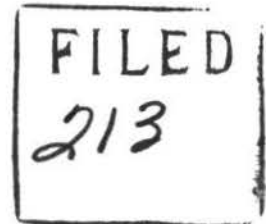
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JOHN C. DANFORTH
Attorney General

October 15, 1975

OPINION LETTER NO. 213
Answer by Letter - Klaffenbach

Honorable Margaret Miller
State Representative, District 145
Post Office Box 72
Marshfield, Missouri 65702



Dear Mrs. Miller:

This letter is in response to your inquiry asking:

"Under Senate Bill 95 as enacted by the 78th General Assembly, is there an obligation that county judges in second, third and fourth class counties participate actively in all councils and agencies referred to, either specifically or in general, in the bill in order to receive an increase in pay as provided?"

You also state:

"There are certain of the agencies mentioned in the statute to which the court of Webster Co. does not belong and others to which it is not eligible."

The legislation to which you refer, Senate Bill 95 of the 78th General Assembly, provides:

"Section 1. For the benefit of the executive branch and members and staff of the general assembly, in determining local needs in appropriation of funds of the state, the judges of the county court in all counties of the second, third and fourth class shall

Honorable Margaret Miller

file with the office of administration, committee on state fiscal affairs, and the state auditor copies of summarized reports of all funds received from any agency of the United States government. Further, judges of the county court, collectively or by designation of the presiding judge, shall represent the county on the following regional councils which may encompass their county: manpower planning; aging; health planning; law enforcement assistance; community action; countywide sewer districts; solid waste management; county planning and zoning; university of Missouri extension; future boards, commissions and councils relating to health, education or welfare of the citizens as established by executive or legislative action of the government of the United States or of the state; and such other councils and organizations relating to operations of counties as from time to time may be created.

"Section 2. 1. As compensation for the extra duties imposed by section 1 of this act, each judge of the county court in counties of the second class shall receive, in addition to all other compensation provided by law, an annual sum to be paid out of the county treasury based upon the assessed valuation of the county as follows:

Assessed Valuation of the County	Amount of Salary
Less than \$150,000,000	\$1,200.00
More than \$150,000,000	\$1,500.00

"2. As compensation for the extra duties imposed by section 1 of this act, each judge of the county court in counties of the third and fourth class shall receive, in addition to all other compensation provided by law, an annual sum to be paid out of the county treasury based upon the assessed valuation of the county as follows:

Assessed Valuation of the County	Amount of Salary
Less than \$25,000,000	\$1,000.00
More than \$25,000,000	\$1,200.00"

Honorable Margaret Miller

It is our view that the judges of the county courts are entitled to the extra compensation even though they may not be actively participating in all the councils and agencies referred to either specifically or in general in the legislation. We reached this view because under the holding of State v. Carpenter, 388 S.W.2d 823 (Mo. Banc 1965), an officer is entitled to the compensation provided by statute for the performance of duties by such officer even though it is impossible for him to perform such duties.

We therefore conclude that the judges of the county court are entitled to the extra compensation provided even though they may not be actively involved in all the organizations enumerated in Senate Bill 95.

Very truly yours,

JOHN C. DANFORTH
Attorney General

ASSESSORS:
ASSESSMENTS:
COMPENSATION:
COUNTY JUDGES:

1. The rate of compensation of county assessors in third and fourth class counties and second class counties except those having an assessed valuation in excess of three hundred million dollars as of January 1, 1974, for additional duties required by Section 53.073 (Senate Bill No. 373, 77th General Assembly, Second Regular Session), shall be based upon their county's total assessed valuation for the tax year which encompasses the first day of September beginning the annual salary period. 2. The rate of compensation of county court judges in second, third, and fourth class counties for additional duties authorized in Senate Committee Substitute for Senate Bill No. 95, 78th General Assembly, First Regular Session, shall be based upon the assessed valuation of the county for the tax year immediately preceding the year in which the compensation is due.

OPINION NO. 214

November 13, 1975

Honorable George W. Lehr
State Auditor
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Lehr:

This opinion is in response to your request as follows:

"What year of assessment valuation should be utilized in calculating the following:

1. The level of compensation for county assessors for the extra duties authorized by Sections 53.073 and 53.074, RSMo, as amended by Senate Bill No. 373, Seventy-Seventh General Assembly, Second Regular Session;

2. The level of compensation for county judges for the extra duties authorized by Senate Bill No. 95, Seventy-Eighth General Assembly, First Regular Session."

In response to your first question, Sections 53.073 and 53.074, RSMo, as amended in 1974, state:

"Each county assessor, except in counties of the first class and counties of the

Honorable George W. Lehr

second class having an assessed valuation in excess of three hundred million dollars as of January 1, 1974, shall on or before October first of each year furnish to the county collector of the revenue of his county a list of all real property transfers occurring after January first of that year and before September first of that year. The list shall contain a description of the property transferred and the name of each grantor and grantee and their addresses if known." (Section 53.073)

"As compensation for the extra duties imposed by section 53.073, each assessor shall receive, in addition to all other compensation provided by law, a sum to be paid out of the county treasury to be computed as follows:

(1) In all counties with an assessed valuation of less than thirty million dollars, one thousand dollars;

(2) In all counties with an assessed valuation of thirty million dollars but less than seventy million dollars, one thousand five hundred dollars;

(3) In all counties with an assessed valuation of seventy million dollars but less than one hundred million dollars, two thousand dollars;

(4) In all counties with an assessed valuation of one hundred million dollars but less than one hundred fifty million dollars, two thousand five hundred dollars;

(5) In all counties with an assessed valuation of one hundred fifty million dollars but less than two hundred million dollars, three thousand dollars;

(6) In all counties with an assessed valuation of two hundred million dollars but less than two hundred fifty million dollars, three thousand five hundred dollars;

Honorable George W. Lehr

(7) In all counties with an assessed valuation of two hundred fifty million dollars but less than three hundred million dollars, four thousand dollars;

(8) In all counties with an assessed valuation of three hundred million dollars but less than three hundred fifty million dollars, four thousand five hundred dollars;

(9) In all counties with an assessed valuation of three hundred fifty million dollars or more, five thousand dollars."
(Section 53.074)

In addition, Section 53.071, RSMo, was amended as part of the same legislative act (Senate Bill No. 373, 77th General Assembly, Second Regular Session). Section 53.071 established salary levels for county assessors in second, third, and fourth class counties based upon the assessed valuation of the particular county. Section 53.071.3 states:

"3. For the purpose of computing an assessor's compensation, the term 'assessed valuation' means the total assessed valuation of his county as computed by the state tax commission for the tax year in which the September first, which begins the year of incumbency for which the annual compensation is computed falls. The state tax commission shall provide the department of revenue with each such computation of valuation made by them."

In Opinion No. 327, Eiffert, December 18, 1974 (copy enclosed), this office concluded that the annual level of compensation of an assessor is to be paid for the period of September 1 to August 31 of the following year. Furthermore, the assessor's compensation is to be computed based upon the assessed valuation of the county for the tax (calendar) year in which a particular annual salary period (September 1) begins.

You have now asked which year of assessed valuation is to be used as the basis for computing the compensation for the additional duties contained in Sections 53.073 and 53.074.

In Opinion No. 17, Paden, January 25, 1968 (copy enclosed), this office considered a similar question concerning compensation to prosecuting attorneys. In that case, an amendment to Section 56.291,

Honorable George W. Lehr

RSMo, was silent concerning which tax year to use as the basis for computing the compensation for additional duties for prosecuting attorneys. The opinion concluded that the increased compensation should begin January 1 after the year in which the State Tax Commission had raised the assessment level. The reasoning was that the assessment process did not begin until May 1 of each year and may not conclude until December 31. Therefore, the intent of the legislature was clear that the increased compensation should begin the next year.

However, in Opinion No. 327, 1974, mentioned previously, this office considered Section 53.071, quoted previously, which does contain an express reference to which year of assessed valuation should apply. The opinion stated:

"We recognize that a particular county might have some difficulty in determining, by September 1, whether the assessed valuation for that year has increased so as to reach a new plateau set out in Section 53.071.1. The difficulty arises because the State Tax Commission may not, in a particular year, certify an increase in the assessed valuation of a county until after September 1. However, this fact would in no way affect the obligation of the county and state to pay the level of salary to which the assessor is entitled under the statutes. This is because the assessed valuation is as of January 1, even though assessment may not be completed until a later date. Long v. City of Independence, 229 S.W.2d 686 (Mo. 1950).

"The rule is that the statutes create the right of a public official to compensation for his services and such official is entitled to receive or recover the compensation to which he is entitled. Bates v. City of St. Louis, 54 S.W. 439 (Mo. 1899); Davenport v. Teeters, 315 S.W.2d 641 (Spr.Ct.App. 1958). The failure of the county court to budget the full amount of salary due an official does not bar the right of such official to be paid the balance of the salary due him. Gill v. Buchanan County, 142 S.W.2d 665 (Mo. 1940). With these rules in mind, it is the opinion of this office that where the assessed

Honorable George W. Lehr

valuation of a county increases so as to entitle a county assessor to increased compensation, such assessor is entitled to the increased compensation from September 1 of that taxable year despite the possibility that the increase in the assessed valuation may not be finally known to the county until after September 1. We believe that the language of Section 53.071.3 clearly intends such a result."

As previously noted, Senate Bill No. 373, 77th General Assembly, Second Regular Session, contained an amendment to Section 53.071 and enacted Sections 53.073 and 53.074. One of the amendments to Section 53.071 was to change the tax year used to compute compensation from "the tax year immediately preceding the tax year for which the salary is paid" (Laws 1969, p. 79) to "the tax year in which the September first, which begins the year of incumbency for which the annual compensation is computed falls."

One principle of statutory interpretation is that:

" . . . '[t]he endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with respect to the subject matter has been changed or modified from time to time. . . .'"
(State ex rel. Jackson County v. Spradling, 522 S.W.2d 788, 791 (Mo.Banc 1975); 82 C.J.S. Statutes § 366, pp. 808-810)

In applying this principle to the question at hand, it is our view that since the General Assembly, in one act, changed the tax year used to calculate basic compensation of county assessors and also established additional duties to be compensated based upon assessed valuation of the particular county, it logically follows that the General Assembly intended for the additional duties to be compensated upon the same basis as the general compensation. As a practical matter, it is unlikely that the General Assembly intended that two separate tax years be utilized to calculate different portions of the compensation to county assessors. Therefore, it is our view that the considerations discussed in Opinion No. 17, 1968, yield to the intent expressed by the General Assembly in Senate Bill No. 373 which recognizes the unique term of annual compensation of county assessors which begins on September 1 of each year.

Honorable George W. Lehr

While it is our view generally that the General Assembly intended to use the same tax year (the current year within which an annual salary period begins on September 1) for computing general compensation and additional duties for particular county assessors, we repeat our view expressed in Opinion No. 327, 1974, that any affected county assessor, who would otherwise receive an increase in his basic compensation by utilizing the new tax year method, is prohibited from receiving the increase during his present term of office, pursuant to Article VII, Section 13, Missouri Constitution. This restriction does not apply to the compensation for the additional duties. See Opinion No. 313, Briscoe, October 23, 1974 (copy enclosed).

Your second question concerns recent legislation (Senate Committee Substitute for Senate Bill No. 95, 78th General Assembly, First Regular Session) in which the General Assembly establish additional duties for county court judges in second, third, and fourth class counties.

Senate Bill No. 95 states:

"Section 1. For the benefit of the executive branch and members and staff of the general assembly, in determining local needs in appropriation of funds of the state, the judges of the county court in all counties of the second, third and fourth class shall file with the office of administration, committee on state fiscal affairs, and the state auditor copies of summarized reports of all funds received from any agency of the United States government. Further, judges of the county court, collectively or by designation of the presiding judge, shall represent the county on the following regional councils which may encompass their county; manpower planning; aging; health planning; law enforcement assistance; community action; countywide sewer districts; solid waste management; county planning and zoning; university of Missouri extension; future boards, commissions and councils relating to health, education or welfare of the citizens as established by executive or legislative action of the government of the United States or of the state; and such other councils and organizations relating to operations of counties as from time to time may be created.

Honorable George W. Lehr

"Section 2. 1. As compensation for the extra duties imposed by section 1 of this act, each judge of the county court in counties of the second class shall receive, in addition to all other compensation provided by law, an annual sum to be paid out of the county treasury based upon the assessed valuation of the county as follows:

Assessed Valuation of the County Amount of Salary

Less than \$150,000,000	\$1,200.00
More than \$150,000,000	\$1,500.00

"2. As compensation for the extra duties imposed by section 1 of this act, each judge of the county court in counties of the third and fourth class shall receive, in addition to all other compensation provided by law, an annual sum to be paid out of the county treasury based upon the assessed valuation of the county as follows:

Assessed Valuation of the County Amount of Salary

Less than \$25,000,000	\$1,000.00
More than \$25,000,000	\$1,200.00"

The act is silent concerning which year of assessed valuation to use as a basis for calculating the level of compensation.

We find no other expression of intent of the General Assembly concerning which tax year to use to compute the level of compensation for county court judges in second, third, and fourth class counties. Therefore, it is our view that our analysis in Opinion No. 17, 1968, is applicable here. As such, it is our view that when the assessed valuation of a county increases sufficiently to place it in a higher compensation bracket, as established in Senate Bill No. 95, the county court judges are entitled to the increased compensation as of the following January 1.

CONCLUSION

It is the opinion of this office that:

1. The rate of compensation of county assessors in third and fourth class counties and second class counties except those having an assessed valuation in excess of three hundred million

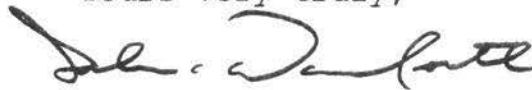
Honorable George W. Lehr

dollars as of January 1, 1974, for additional duties required by Section 53.073 (Senate Bill No. 373, 77th General Assembly, Second Regular Session), shall be based upon their county's total assessed valuation for the tax year which encompasses the first day of September beginning the annual salary period.

2. The rate of compensation of county court judges in second, third, and fourth class counties for additional duties authorized in Senate Committee Substitute for Senate Bill No. 95, 78th General Assembly, First Regular Session, shall be based upon the assessed valuation of the county for the tax year immediately preceding the year in which the compensation is due.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Andrew Rothschild.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 327
12-18-74, Eiffert

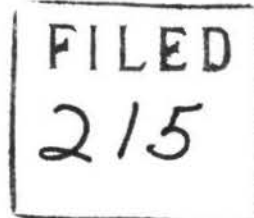
Op. No. 17
1-25-68, Paden

Op. No. 313
10-23-74, Briscoe

October 7, 1975

OPINION LETTER NO. 215
Answer by Letter - Burns

Honorable R. L. Usher
Representative, District 12
600 Sunset Drive
Macon, Missouri 63552



Dear Mr. Usher:

This is in answer to your recent opinion request based upon a letter addressed to you by Frank A. Ayers, Director, Juvenile Court Services, Forty-First Judicial Circuit. Essentially, Mr. Ayers asks for an Attorney General's opinion as to the "legality and fairness" of the General Assembly's action in providing certain specific salaries for certain juvenile officers in the state of Missouri and providing for different maximum payments for other juvenile officers of the state. The argument advanced is that because each circuit judge is allegedly paid the same salary throughout the state, a statute providing different payments for different juvenile officers in the state is invalid.

We, of course, are not in a position to make any legal ruling as to the "fairness" of the statutory provisions provided by the General Assembly for the compensation of juvenile officers. The matter of the compensation of juvenile officers is a matter that is to be determined by the General Assembly and this office, of course, has no authority to take any position as to the "fairness" of such statutory provision.

No constitutional provision is cited which would require that the salaries of juvenile officers must be uniform throughout the state if the salaries of circuit judges are uniform throughout the state and we can find no constitutional provision so providing. As a matter of fact, as recently as 1969 the salaries of circuit judges in this state did vary depending upon the composition of the circuit and upon the actions of various county courts. See § 478.013, RSMo 1969.

Honorable R. L. Usher
Page 2

It is, therefore, our view that the action of the General Assembly in providing specific salaries for certain juvenile officers and providing for different maximum salaries for other juvenile officers in this state is a valid exercise of the power of the General Assembly. Uniformity in payment of juvenile officers will come about only if the General Assembly enacts statutes providing for the payment of compensation of juvenile officers to be uniform throughout the state.

Very truly yours,

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

November 3, 1975

OPINION LETTER NO. 216

Honorable S. Sue Shear
State Representative, District 76
200 South Brentwood
Clayton, Missouri 63105

Dear Representative Shear:

This letter is in response to your request for an opinion on the following question:

"Pertaining to Statute #221.050--Must men and women be placed in a separate locality? Can it be a separate wing or some other wing within the division?"

Section 221.050, RSMo 1969, provides as follows:

"Persons confined in jails shall be separated and confined according to sex. Persons confined under civil process or for civil causes shall be kept separate from criminals."

We understand your inquiry to be whether separate buildings and related facilities must be established for male and female prisoners. We do not read the above-quoted section to so require. It appears that it would be sufficient under that section if within a jail, male and female prisoners are segregated from one another.

Very truly yours,

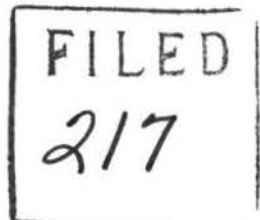
JOHN C. DANFORTH
Attorney General

November 5, 1975

OPINION LETTER NO. 217

Answer by Letter - Klaffenbach

Honorable Irene E. Treppler
State Representative, District 106
4681 Fuchs Road
St. Louis, Missouri 63128



Dear Representative Treppler:

This letter is in response to your question which we understand has been amended to state as follows:

"In view of the provisions of Art. 6, Sections 23 and 25 of the Missouri Constitution for 1945 and the Statutory provisions to be found in Chapter 321 of the Revised Statutes of Missouri, can a Board of Directors of a Fire Protection District which has been incorporated pursuant to the Chapter 321 of the Revised Statutes of Missouri legally spend public funds for the following purposes:

"(1) To provide at public costs Health and Accident Insurance for its paid employees who may become ill or injured while on the job.

"(2) To provide at public costs Health and Accident Insurance for its paid employees who may become ill or injured while off the job.

"(3) To provide at public cost Health and Accident Insurance for the family of the living employees.

Honorable Irene E. Treppler

"These insurance benefits being furnished as a part of the employees' compensation from the district."

The sections of the Constitution to which you refer, Sections 23 and 25 of Article VI, prohibit grants of money by political corporations or subdivisions to private corporations or individuals with certain specified exceptions. The pertinent exception is found in Section 25 of Article VI, which provides that:

". . . except that the general assembly may authorize any county, city or other political corporation or subdivision to provide for the retirement or pensioning of its officers and employees . . ."

The powers of the fire protection district are found in Section 321.600, RSMo 1969. While the contention has been made that Section 321.220, RSMo 1969 is the applicable section, this office has already previously reached the conclusion that Section 321.600 is applicable to fire protection districts in first class counties. We have enclosed Opinion No. 511, dated October 6, 1970, to Cantrell, which reached this conclusion.

With respect to your first question asking whether the fire protection district can provide at public cost health and accident insurance for its paid employees who may become ill or injured while on the job, it is our view that this authority is, with certain limitations, given to the fire protection district under the provisions of Section 321.600(15), subject to approval by the voters.

The pertinent portion of that section states:

"To provide for the pensioning of the salaried members of its organized fire department of the district and to provide for the payment of death benefits to the widows and minor children of members of its organized fire department, or if such member is unmarried or without minor children, to his next of kin, including adult children, if any, or other person designated by him or his estate, who lose their lives while on duty; and to provide for the payment of health, accident or disability benefits to such salaried members of its organized fire department, who shall become

Honorable Irene E. Treppler

disabled due to injury or disease incurred while on duty or in the performance of their duties; . . ."

As we indicated, however, the authority thus granted is subject to the approval of the voters as further expressly provided in subsection 15.

Therefore, since the legislature has expressly provided, subject to voter approval, for the payment of certain health, accident or disability benefits to such salaried employees while on duty, the subsection authorizes the furnishing of health, accident or disability benefits to salaried members who become disabled due to injury or disease incurred while on duty.

Your second question asks whether such benefits may be provided for paid employees who may become ill or injured while off the job. We believe that the legislature having expressly provided that such benefits are payable only for disease or injury on the job excluded the authority to provide for similar benefits off the job. Therefore, we reach the conclusion that there is no authority to pay for such benefits which occur off the job.

You have also asked whether constitutional provisions, Sections 23 and 25 of Article VI, prohibit such benefits. There is authority that the public purpose doctrine would support laws providing job related benefits to employees. See Hickey v. Board of Education of City of St. Louis, 256 S.W.2d 775 (Mo. 1953); State ex rel. Cleaveland v. Bond, 518 S.W.2d 649 (Mo. 1975).

Since there are distinct legal principles which could support the constitutionality of the authorization to furnish health and accident insurance as contained in subsection 15, we do not believe that we are in a position to challenge the constitutionality of such section. It is a well-settled principle of constitutional construction that only when there is a clear conflict between a legislative enactment and the Constitution are the courts warranted in declaring the law to be void. In the Matter of Burris, 66 Mo. 442, 450 (1877); Borden Company v. Thomason, 353 S.W.2d 735, 743 (Mo.Banc 1962).

In answer to your question asking whether health and accident insurance benefits can be provided for employees who become ill or injured while off the job as part of the employees' compensation, we have answered that such benefits are not specifically authorized by the statutes. We previously reached the conclusion in our Opinion No. 93, dated September 9, 1969 to Cason, that insurance may be provided to employees of certain political

Honorable Irene E. Treppler

subdivisions as a part of their compensation even in the absence of a statute expressly authorizing insurance. However, in this case it is clear that the fire protection district is limited by the express provisions of Section 321.600 to the furnishing of certain benefits after approval by the voters only to those employees who become disabled due to injury or disease while on duty and thus the legislature has, in our view, impliedly prohibited the furnishing of such insurance as a part of employees' compensation.

Your third question asks whether the fire protection district has authority to provide at public costs health and accident insurance for the families of living employees. We believe that this question has been answered by the Missouri Supreme Court in State ex rel. Sanders v. Cervantes, 480 S.W.2d 888 (Mo.Banc 1972). In that case the court held unconstitutional a statute which provided for insurance coverage for dependents of living officers and employees on active duty with the St. Louis police force.

In such case the court stated, l.c. 92:

"In apparent anticipation of our being compelled to so hold, relators submit that expenditures providing direct insurance benefits to wives and children of a living officer or employee could be construed as coming within the connotation of the word 'compensation' legally payable to said officers or employees. It is argued that such coverage is a form of compensation for the reason it shifts '. . . to public municipal funds the burden of the loss occasioned to the officer by death or sickness of his dependents . . . ' and, '. . . the relief afforded by such coverage inures primarily to the officer or employee. . . . ' Without evaluating the benefit an officer or employee might thereby receive, it is apparent that such an argument would also allow for removing other obligations of the (husband--parent) officer or employee, i.e., the obligation also to provide food, clothing and shelter to his or her dependents. Additionally, we do not doubt the difficulty, expressed by relators, that it must compete for personnel with private business that generally provides such 'fringe benefits.' Recognition of this fact, however, does not

Honorable Irene E. Treppler

overshadow the basic truth that relators, the city, the general assembly and this court must resolve all such difficulties in compliance with the dictates of the citizens of this state as expressed in their constitution."

We therefore conclude that the providing of health and accident insurance for the family of living employees cannot be supported on the basis of compensation since this point has already been ruled upon in Sanders v. Cervantes, supra.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 511
10/6/70, Cantrell

November 25, 1975

OPINION LETTER NO. 223
Answer by letter-Rothschild

Honorable George W. Lehr
State Auditor
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Lehr:

This opinion is in response to your question as follows:

"Does the board of trustees of a county hospital (Sections 205.160 to 205.340, RSMo) have the authority to deposit idle funds in accounts which offer the best security and rate of interest?"

This office, in Opinion No. 478, Baker, December 22, 1966 (copy enclosed), concluded that a county hospital board was not authorized to invest surplus funds unless expressly authorized to do so by statute. The opinion found no statute authorizing such investment. Our review of the statutory changes to Sections 205.160 to 205.340, RSMo, since Opinion No. 478, 1966, reveals no additional statutory authorization. Therefore, it is our view that Opinion No. 478, 1966, remains valid.

We do note, however, that pursuant to Section 205.190, RSMo, the county treasurer (or county collector for counties without a county treasurer) is the treasurer of the board of trustees of the county hospital and serves as treasurer for all funds collected to the credit of the hospital fund.

In Opinion No. 164, Lehr, July 23, 1975 (copy enclosed), this office expressed its opinion that counties, among others, were authorized to invest their funds in time deposits, including certificates of deposit. In this situation, the county court is authorized to invest the funds collected to the credit of the hospital

Honorable George W. Lehr

fund, in the same manner as other county funds are invested, pursuant to the provisions of Chapter 110, RSMo. All interest earned from county hospital funds shall be credited to those funds. Section 110.150, RSMo Supp. 1973. (Prior to 1971, all interest for these funds was credited to the road and bridge fund.) This authority (to invest county hospital funds) rests solely with the county court but, as a practical matter, consultation with the county hospital board would be advisable because the board has ". . . exclusive control of the expenditures of all moneys collected to the credit of the hospital fund, . . ." (Section 205.190.4, RSMo).

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 478
Baker, 12-22-66

Op. No. 164
Lehr, 7-23-75

AUDITS:
COUNTIES:
STATE AUDITOR:
COUNTY HOSPITALS:

The State Auditor is obligated to include county hospitals established pursuant to Sections 205.160 to 205.340, RSMo, within the scope of his audit of counties containing such an institution.

OPINION NO. 224

November 26, 1975

Honorable George W. Lehr
State Auditor
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Lehr:

This opinion is in response to your question as follows:

"Am I required to include within the audit scope of audits of third and fourth class counties conducted pursuant to Section 29.230, RSMo, county hospitals created pursuant to Sections 205.160-205.340, RSMo?"

Section 29.230, RSMo, states:

"1. In every county which does not elect a county auditor, the state auditor shall audit, without cost to the county, at least once during the term for which any county officer is chosen, the accounts of the various county officers supported in whole or in part by public moneys. The audit shall be made as near the expiration of the term of office as the auditing force of the state auditor will permit.

"2. The state auditor shall audit any political subdivision of the state, including counties having a county auditor, if requested to do so by a petition signed by five percent of the qualified voters of the political subdivision determined on the basis of the votes cast for the office of governor in the last election held prior to the filing of the petition. The political subdivision shall pay the actual cost of audit.

Honorable George W. Lehr

No political subdivision shall be audited by petition more than once in any one calendar or fiscal year." (Emphasis added)

This provision establishes authority for the State Auditor to audit the accounts of county and local government. Subsection 29.230.1 requires the State Auditor to audit the accounts of "county officers," during their terms, in counties that do not elect a county auditor. Subsection 29.230.2 requires the State Auditor, upon proper petition, to audit any political subdivision of the state (including counties having a county auditor).

In order to answer your question, it must be determined whether the board of trustees of a county hospital, established pursuant to Sections 205.160 to 205.340, RSMo, are "county officers" within the meaning of Subsection 29.230.1.

Sections 205.160 to 205.340, RSMo, generally provide for county hospitals. Trustees of the hospital are elected to four year terms, Section 205.170. The county treasurer (or collector) shall serve as treasurer of the board. Section 205.190. The board of trustees shall govern the operation of the hospital and have complete control over expenditures. Section 205.190. A property tax may be levied, as certified by the board of trustees to the county court. Section 205.200. The county court is authorized to appropriate money for the improvement and maintenance of the hospital. Section 205.230. The county court is authorized to issue general obligation bonds for the hospital, Section 205.160, and revenue bonds, Section 205.161.

The Supreme Court of Missouri has characterized a county hospital as a "county entity," and an "instrumentality of the county," and a "creature" of the county. Fulton National Bank v. Callaway Memorial Hospital, 465 S.W.2d 549, 551-552 (Mo. 1971). Furthermore, the court has considered the members of the board of trustees of county hospitals as "public officials" of the county. State ex rel. Holman v. Trimble, 293 S.W. 98, 102 (Mo. Banc 1927).

This office has issued several opinions which relate to this question. A county hospital performs a governmental function not a proprietary function. Opinion No. 15, Cave, April 10, 1950. The conduct of a county hospital is "county business." Opinion No. 92, Vogel, March 5, 1953. The members of the board of trustees of a county hospital are "public officers." Opinion No. 70, Peal, December 1, 1954. See also Opinion No. 2, Amos, May 7, 1953, which contains an analysis of the legal status of members of the board of trustees of county health centers (Sections 205.010 to 205.155, RSMo) which are identical in legal status with trustees of county hospitals. In that opinion, we stated, at page 9:

Honorable George W. Lehr

" . . . it is obvious that the members of a Board of Trustees of a County Health Center have the title and status of public officials, and have been required to perform the duties of such public officials. . . ."

The Supreme Court of Missouri has held that a county hospital is not a political subdivision of the state for purposes of jurisdiction before the court. Stribling v. Jolley, 245 S.W.2d 885, 890 (Mo.Banc 1952).

Contrast also, the Hospital District Law (Chapter 206) under which a hospital district which is formed is expressly characterized as a "body corporate and political subdivision of the state." (Subsection 206.010.2, RSMo).

From the foregoing, it our conclusion that while a county hospital established pursuant to Sections 205.160 to 205.340, RSMo, is actually under the control of a board of trustees instead of the county court, its operation is part of the functioning of county government. As such, the members of the board of trustees are public officials of the county and are considered "county officers supported in whole or in part by public moneys" as the term is used in Subsection 29.230.1, RSMo.

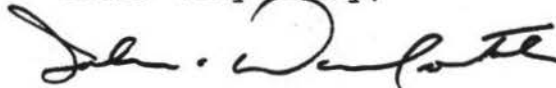
Therefore, it is our view that you, as State Auditor, are obligated to include a county hospital established pursuant to Sections 205.160 to 205.340, RSMo, within the scope of an audit of a county containing such an institution.

CONCLUSION

It is the opinion of this office that the State Auditor is obligated to include county hospitals established pursuant to Sections 205.160 to 205.340, RSMo, within the scope of his audit of counties containing such an institution.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Andrew Rothschild.

Yours very truly,



JOHN C. DANFORTH
Attorney General

December 1, 1975

OPINION LETTER NO. 226
Answer by Letter - Iverson

Ms. Virginia G. Young
Chairman, Coordinating Board
for Higher Education
600 Clark Avenue
Jefferson City, Missouri 65101



Dear Ms. Young:

This is in response to your opinion request in which you ask the following questions:

"Is the Commissioner of Higher Education the director of the Department of Higher Education within the meaning of Section 1.6(3) of the Omnibus Reorganization Act of 1974?

"If that question is answered affirmatively, is the Coordinating Board for Higher Education authorized, as head of the Department of Higher Education, to set the annual salary for the Commissioner of Higher Education within the meaning of Section 1.6(7) of said Act?"

The Department of Higher Education and the Coordinating Board for Higher Education were created under the provisions of Sections 12 and 52 of Article IV of the Missouri Constitution and Sections 1.5, 6.1 and 6.2 of Senate Bill No. 1 of the 77th General Assembly, the Omnibus Reorganization Act of 1974. Section 6.2 of Senate Bill No. 1, provides that all powers, duties, personnel and property of the former Commission on Higher Education contained in Chapter 173 of the Missouri statutes be transferred by a Type 1 transfer to the Coordinating Board. In addition, Section 6.2 of Senate Bill No. 1 provides that ". . . the coordinating board shall be the head of the department."

Ms. Virginia G. Young

When the "head of the department" is a commission or board, Section 1.6(3) of Senate Bill No. 1 provides:

" . . . it shall appoint a director of the department unless otherwise provided by this act and may delegate such duties, powers and authority to the director of the department as it deems necessary to fulfill the duties and obligations of the department. Such director shall serve at the pleasure of the head of the department and shall have the title of office provided herein."

Section 6.2 of Senate Bill No. 1 provides that the Coordinating Board for Higher Education shall appoint a commissioner as the chief administrative officer for the board. It is the opinion of this office that the Commissioner of Higher Education is the "chief administrative officer" of the Department of Higher Education designated in Section 1.6(3) of Senate Bill No. 1. Therefore, we answer affirmatively your first question as to whether the Commissioner of Higher Education is the "director" of the Department of Higher Education.

You ask next whether the Coordinating Board for Higher Education, as head of the department, is authorized to set the annual salary for the Commissioner of Higher Education within the meaning of Section 1.6(7) of Senate Bill No. 1, which provides as follows:

"The director of each department, other than those directors appointed by the heads of departments authorized to set salaries of directors, shall receive an annual salary of thirty thousand dollars payable in twelve equal monthly installments."
(Emphasis supplied).

Section 1.6(7) requires that the director of the department receive an annual salary of thirty thousand dollars, unless the "head of the department" is authorized to set the salary of its director. The answer to your second question, therefore, depends upon whether the Missouri Constitution or statutes confer upon the Coordinating Board for Higher Education the authority to set the salary of its director.

Nothing contained in Article IV, Section 52 of the Missouri Constitution, Chapter 173, RSMo, or Section 6 of Senate Bill No. 1, authorizes the Coordinating Board for Higher Education to set the salary of the Commissioner. Because the Coordinating Board for

Ms. Virginia G. Young

Higher Education is not one of the "heads of departments authorized to set the salary of its director," Section 1.6(7) requires that the Commissioner of Higher Education be paid a salary of thirty thousand dollars (\$30,000).

The Commissioner of Higher Education is the director of the Department of Higher Education within the meaning of Section 1.6(3) of the Omnibus Reorganization Act of 1974. The Coordinating Board for Higher Education is not authorized to set the salary of the Commissioner of Higher Education. Section 1.6(7) of the Omnibus Reorganization Act of 1974 requires, therefore, that the Commissioner be paid an annual salary of thirty thousand dollars (\$30,000).

Very truly yours,

JOHN C. DANFORTH
Attorney General

November 25, 1975

OPINION LETTER NO. 230
Answer by letter-Mansur

Honorable John W. Reid, II
Prosecuting Attorney
Madison County
148 East Main Street
Fredericktown, Missouri 63645

Dear Mr. Reid:

This is in response to your request for an opinion from this office on whether a county hospital organized under Section 205.160, RSMo, may borrow money if the debt does not exceed the prohibition in Article VI, Section 26a of the Missouri Constitution.

We are enclosing herewith Opinion No. 20 issued on March 16, 1961, to Clifford Crouch concerning the authority of a county health center organized under the provisions of Section 205.010, RSMo, to borrow money or issue tax anticipation notes for the benefit of the county health center.

We believe the statutes that apply to the authority of the county health center regarding the borrowing of money and issuing of tax anticipation notes would apply to the authority of the trustees of a county hospital organized under Section 205.160, RSMo, and the answers to the questions you have in mind will be found in this opinion.

You state in a memorandum that a county hospital is a political subdivision of the state. It is our view that a county hospital is not a political subdivision of the state. Stribling v. Jolley, 245 S.W.2d 885 (Mo.Banc 1952).

Yours very truly,

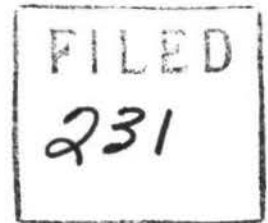
JOHN C. DANFORTH
Attorney General

Enclosure

November 3, 1975

OPINION LETTER NO. 231
Answer by Letter - Klaffenbach

Honorable Phil Snowden
State Representative, 20th District
6317 N.E. Antioch Road
Gladstone, Missouri 64119



Dear Representative Snowden:

This letter is in answer to your questions asking:

- "A. Can a Missouri State Representative or State Senator be a shareholder in a limited dividend corporation, a limited partner in a limited partnership or a sponsor for an application for funds from the Missouri Housing Development Commission (Chapter 215, R.S.Mo., 1969) to rehabilitate or construct new housing units in the state?
- "B. Can a Missouri State Representative or a Missouri State Senator act as the attorney of record and receive a fee from a sponsoring group making application for funds from the Missouri Housing Development Commission (Chapter 215, R.S.Mo., 1969) to rehabilitate or construct new housing units in the state?"

We believe that the questions you present are similar to those answered in our Opinions No. 334 in 1974 and No. 332 in 1973, copies enclosed. We find no statute which directly prohibits such participation or representation, and, employing

Honorable Phil Snowden

the reasoning of the prior opinions, we are of the view that the legislator is not prohibited from acting in either of the situations presented.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 332
11-16-73, Miller

Op. No. 334
11-18-74, Goward

PENSIONS:

RETIREMENT:

COMPENSATION:

CONSTITUTIONAL LAW:

MISSOURI EMPLOYEES' RETIREMENT SYSTEM:

1. An individual who is presently retired and receiving retirement benefits which were calculated by multiplying one percent (1%) of his average pay (not

to exceed \$7,500 per year) during the five consecutive years of his work when his pay was the greatest, times his years of creditable service, is entitled to have his benefits recalculated under subsection 1 of Section 104.610, Senate Bill No. 5, 78th General Assembly, First Regular Session, in order that the individual may receive additional compensation from the state for services as a special consultant.

2. If an individual's benefits are to be recalculated under the provisions of subsection 1 of Section 104.610, Senate Bill No. 5, 78th General Assembly, First Regular Session, then said individual is also eligible for the increase in compensation under the provisions of Section 104.090, RSMo Supp. 1973.

OPINION NO. 235

December 31, 1975

Mr. Edwin M. Bode, Executive Secretary
Missouri State Employees' Retirement System
P. O. Box 209
Jefferson City, Missouri 65101

FILED

235

Dear Mr. Bode:

This is to acknowledge receipt of your request for an opinion from this office which reads as follows:

"Advice is requested as to whether or not an individual who is presently retired and receiving retirement benefits which were calculated by multiplying 1% of his average pay (not to exceed \$7500.00 per year) during the five consecutive years of his work when his pay was the greatest, times his years of creditable service, is entitled to have his benefits recalculated under Senate Bill No. 5, as a result of the removal on the \$7500 limitation in the definition of average compensation in 1967.

"If benefits are to be recalculated for the above individual under Senate Bill No. 5, is the individual also eligible for the .25% increase in compensation?"

Mr. Edwin M. Bode

We will first consider your question relating to recalculation of benefits. Senate Bill No. 5, which was passed by the 78th General Assembly and signed by the Governor, repealed Section 104.610, RSMo Supp. 1973, and enacts in lieu thereof one new section relating to the same subject matter. Previously, subsection 1 of Section 104.610, RSMo Supp. 1973, provided as follows:

"Any person, other than a person receiving retirement benefits because of service in the general assembly, who, on August 13, 1972, is receiving state retirement benefits from the Missouri state employees' retirement system or the highway employees' and highway patrol retirement system, upon application to the board of trustees of the system from which he is receiving retirement benefits, shall be made, constituted, appointed and employed by the board as a special consultant on the problems of retirement, aging, and other state matters, for the remainder of his life, and upon request of the board, or other state agencies where such person was employed prior to retirement, give opinions, and be available to give opinions in writing, or orally, in response to such requests, as may be required, and for such services shall be compensated monthly, in an amount, which, when added to any monthly state retirement benefits being received, shall be equal to the state retirement benefits such person would have received if he had retired on January 1, 1972."

As you are aware, it was held in Attorney General's Opinion No. 293, Bode, 12-13-72 (copy attached), that there was to be no recalculation of benefits under the above statute. However, subsection 1 of Senate Bill No. 5, as recently enacted into law, now provides as follows:

"Any person, other than a person receiving retirement benefits because of service in the general assembly, who, is receiving or hereafter may receive state retirement benefits from the Missouri state employees' retirement system, or the highway employees' and highway patrol retirement system, upon application to the board of trustees of the system from which he is receiving retirement benefits, shall be

Mr. Edwin M. Bode

made, constituted, appointed and employed by the board as a special consultant on the problems of retirement, aging, and other state matters, for the remainder of his life, and upon request of the board, or other state agencies where such person was employed prior to retirement, give opinions, and be available to give opinions in writing, or orally, in response to such requests, as may be required, and for such services shall be compensated monthly, in an amount, which, when added to any monthly state retirement benefits being received, shall be equal to the state retirement benefits such person would have received if his employment had terminated and he had retired under the provisions of the then applicable current retirement act or acts, and as thereafter may be provided by law, and shall be equal to and not less than the maximum monthly state retirement benefits being received under the provisions of section 104.390 of the Missouri state employees' retirement system, or section 104.090 of the highway employees' and highway patrol retirement system, whichever is greater, and regardless of the system where such person was employed at the time of his termination of employment and retirement." (Emphasis ours)

In Attorney General's Opinion No. 293, it was held that an individual who was presently retired and receiving retirement benefits which were calculated by multiplying one percent (1%) of his average pay (not to exceed \$7,500 per year) during the five consecutive years of work when pay was the greatest, times his years of creditable service, was not entitled to receive additional compensation under House Bill No. 1178, as a result of the change of the definition of average compensation in October of 1967. In the opinion, it was pointed out that the question involved the interpretation of the date of January 1, 1972, as appeared in the previous statute. In this regard, it was indicated that the one percent (1%) formula as set forth in Section 104.390, RSMo 1969, and the definition of "average compensation" as set forth in subsection 6 of Section 104.310, RSMo 1969, which are necessarily involved in the calculation of benefits, was the law in effect on January 1, 1972, before Section 104.610, RSMo Supp. 1973, was enacted into law on August 13, 1972. It was further pointed out that subsection 6 of Section 104.310, RSMo 1969, in defining "average compensation" and which was the law in effect on January 1, 1972, provided that any compensation paid which entered into total compensation

Mr. Edwin M. Bode

should not then exceed seven thousand five hundred dollars (\$7,500) if paid prior to October 13, 1967. Therefore, since the statute was plain and unambiguous, it was concluded that the maximum compensation to be considered in determining such an individual's "average compensation" would be seven thousand five hundred dollars (\$7,500) if paid prior to October 13, 1967, and that retired individuals were not entitled to receive additional compensation under House Bill No. 1178.

However, in line with the above comment, it should first of all be noted that the definition of "average compensation" in subsection 6 of Section 104.310, RSMo Supp. 1973, has been changed since the rendering of the 1972 opinion and now provides as follows:

"(6) 'Average compensation', the average annual compensation paid to a member for the five consecutive years of service prior to retirement when his compensation was greatest; or if the member had less than five consecutive years of service, the average annual compensation paid to the member during the entire period of service;"

Thus, under the above statute, there is no longer any limitation on "average compensation." In addition, the date of January 1, 1972, as found in the previous statute, has now been eliminated in subsection 1 of Senate Bill No. 5. In general, the statute now provides any person other than an individual receiving retirement benefits because of service in the General Assembly who is receiving retirement benefits from the Missouri State Employees' Retirement System may be employed as a special consultant. A special consultant is to be compensated in an amount which, when added to any monthly state retirement benefits being received, shall be equal to the state retirement benefits this person would have received if his employment terminated and he had retired under the provisions of the then applicable current retirement act or acts and as thereafter may be provided by law, and shall be equal to and not less than the maximum monthly state retirement benefits being received under the provisions of Section 104.390 of the Missouri State Employees' Retirement System or Section 104.090 of the Highway Employees' and Highway Patrol Retirement System, whichever is greater. With the foregoing background in mind, there is much authority to support the proposition that the primary rule in statutory construction is to ascertain and give effect to legislative intention. Missouri Pacific Railroad Co. v. Kuehle, 482 S.W.2d 505 (Mo. 1972). In determining legislative intent, it has been pointed out that since the legislature is presumed to know the prior construction of the original act, an amendment substituting a new phrase for one previously construed generally indicates that the different interpretation be given the new phrase as

Mr. Edwin M. Bode

the old phrase as interpreted no longer expresses the legislative will. Salitan v. Carter, Ealey and Dinwiddie, 332 S.W.2d 11 (K.C. Mo.App. 1960). In addition, there is authority for the proposition that in construing a statute repealing one statute and substituting another, a court must assume that the General Assembly intended something by the repeal of the old and the enactment of a new statute in lieu of the old statute. As a result, it is our view that the legislature intended that individuals in this category should have their benefits recalculated and consequently the previous interpretation under the old statute is no longer to be followed. Therefore, in response to your first question, it is our view that an individual who is presently retired and receiving retirement benefits which were calculated by multiplying one percent (1%) of his average pay (not to exceed \$7,500 per year) during the five consecutive years of his work when his pay was the greatest, times his years of creditable service, is entitled to have his benefits recalculated under Senate Bill No. 5 in order that the individual may receive additional compensation from the state for services as a special consultant.

We next consider your question that if benefits are to be recalculated for the above individual under Senate Bill No. 5, then is the individual also eligible for the .25% increase in compensation? In this regard, it is our understanding that by the phrase ".25% increase in compensation," you are referring to the normal annuity of a regular member of the Highway Employees' Retirement System which shall equal one and one-fourth percent of the average final compensation of said member multiplied by the number of years of creditable service of such member, under the provisions of Section 104.090, RSMo Supp. 1973. In this regard, as previously indicated, subsection 1 of Senate Bill No. 5 provides in part that a special consultant is to be compensated in an amount which shall be equal to the maximum benefits being received under Section 104.390 of the State Retirement System or Section 104.090 of the Highway System, whichever is greater, and regardless of the system where such person was employed at the time of his termination of employment and retirement. As a result, since the statute is plain and unambiguous, it is our view that if benefits are to be recalculated for an individual under Senate Bill No. 5, then the individual is also eligible for the increase in compensation paid to regular highway employees under the provisions of Section 104.090, RSMo Supp. 1973.

CONCLUSION

The opinion of this office is as follows:

1. An individual who is presently retired and receiving retirement benefits which were calculated by multiplying one percent (1%) of his average pay (not to exceed \$7,500 per year) during the

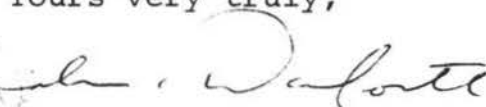
Mr. Edwin M. Bode

five consecutive years of his work when his pay was the greatest, times his years of creditable service, is entitled to have his benefits recalculated under subsection 1 of Section 104.610, Senate Bill No. 5, 78th General Assembly, First Regular Session, in order that the individual may receive additional compensation from the state for services as a special consultant.

2. If an individual's benefits are to be recalculated under the provisions of subsection 1 of Section 104.610, Senate Bill No. 5, 78th General Assembly, First Regular Session, then said individual is also eligible for the increase in compensation under the provisions of Section 104.090, RSMo Supp. 1973.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 293
Bode, 12-13-72



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH
ATTORNEY GENERAL

November 26, 1975

OPINION LETTER NO. 237

Mr. Warren L. McElwain
Prosecuting Attorney
DeKalb County
Post Office Box 512
Maysville, Missouri 64469

Dear Mr. McElwain:

This letter is in response to your request for an opinion asking as follows:

"Does there exist any statute or Attorney General's opinion upon any statute that would prohibit the Ex-Officio Recorder of Deeds of DeKalb County, Missouri, to destroy lapsed financing statements filed in his office pursuant 400 9-403(3) R.S. Mo. 1969?"

You also have called to our attention the fact that the provisions of Section 400.9-403(3), RSMo, provide in part:

". . . Unless a statute on disposition of public records provides otherwise, the filing officer may remove the lapsed statement from the files and destroy it."

We direct your attention, however, to Sections 109.210, et seq., RSMo 1973 Supp., which now govern the handling of state and local records as therein defined. A county officer such as the recorder of deeds is within the definition of "agency" in Section 109.210(1) and the financial statements you refer to would be within the definition of "record" under subsection 5 thereof.

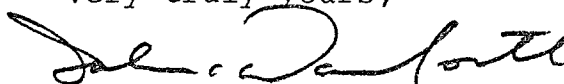
Mr. Warren L. McElwain

Section 109.260 expressly provides that no record shall be destroyed or otherwise disposed of unless it is determined by the State Records Commission or the local records board, as the case may be, that the record has no further administrative, legal, fiscal, research or historical value. Further, Section 109.310 provides:

"Records shall be destroyed according to the provisions of existing law and administrative regulations until the state records commission or local records board promulgates rules and regulations for the destruction of records. All provisions of law and all administrative rules and regulations for the destruction of records are repealed upon the effective date of the rules and regulations for the destruction of records adopted and promulgated by the commission or board pursuant to sections 109.200 to 109.310."

We further wish to advise that we have consulted with a representative of the Secretary of State's Office of the State of Missouri and that such statutes have been implemented. Requests for the destruction of records, we understand, should be forwarded to: James C. Kirkpatrick, Secretary of State, Chairman, Local Records Board, State Capitol Building, Jefferson City, Missouri.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

December 11, 1975

OPINION LETTER NO. 239

Honorable Vernon King
Representative, District 16
2007 East Ridge Drive
Excelsior Springs, Missouri 64124

Dear Representative King:

This is in response to your request for an opinion from this office as follows:

"Can a person be a paid registered lobbyist for a corporation and hold an elective public office.

"Hallmark Cards employs a registered lobbyist in Jefferson City and this same person serves as Western Clay County Judge."

We are enclosing herewith Opinion Letter No. 147 issued by this office on April 19, 1973, to Honorable William Dick Fickle, in which we stated there is no constitutional or statutory provisions which would disqualify a person for the office of county judge because of private employment. The mere fact that a county judge is employed by a private entity with large property holdings in the county is not grounds for disqualification of his office.

Section 105.470, C.C.S.S.C.S.H.C.S. House Bills Nos. 20, 79, 386, 760, and 765, 78th General Assembly, relating to lobbyists, provides in part as follows:

"'Lobbyist', any person, including persons employed by or representing federal or state agencies and all political subdivisions thereof, who acts in the course of his employment or who engages himself for pay or for any

Honorable Vernon King

valuable consideration for the purpose of attempting to influence the taking, passage, amendment, delay or defeat of any legislative action by the legislature; or any person who receives any direct or indirect benefits or expenses for lobbying activities, whether by grant or otherwise, from any state, the federal government or any private not for profit foundation or corporation; provided that the term shall not include any member of the General Assembly or elected state officer."

This statute further requires a lobbyist to register with the chief clerk of the House of Representatives and the Secretary of the Senate.

We find no provision in this statute prohibiting a county court judge from serving as a lobbyist before the General Assembly for a private corporation.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. Ltr. No. 147
4-19-73, Fickle



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

December 4, 1975

OPINION LETTER NO. 242

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Elementary and
Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Commissioner Mallory:

This letter is in response to your request for our review and certification of the amendment to the Missouri State Annual Program Plan for Adult Education entitled "Adult Indochinese Refugee Education Program."

On July 2, 1975, in Opinion Letter No. 166, we certified the Department of Elementary and Secondary Education's annual program plan for adult education programs under the Adult Education Act of 1970, as amended. Nothing in the proposed amendment alters the opinion of this office as set forth in that letter.

Very truly yours,

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

December 19, 1975

OPINION LETTER NO. 244

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

This letter is in response to your opinion request asking as follows:

"Has the Secretary of State been granted rule making authority by the language in §536.023(1) (Supp. 1975) (Senate Bill 58) directing him to prescribe 'uniform procedures' for the numbering, indexing, form and publication of all rules?"

You also state that you are primarily concerned as to whether or not the procedures which are required to be promulgated by the Secretary of State are in fact rules within the meaning of Chapter 536 and Senate Bill No. 58.

S.C.S. Senate Bill No. 58 of the 78th General Assembly (V.A.M.S. Act 80) prescribes detailed procedures relating to administrative rules.

Subsection 1 of Section 536.023, to which you refer, provides as follows:

"The Secretary of State shall prescribe in writing uniform procedures for the numbering, indexing, form and publication of all rules, Notices of Rule Making and Orders of

Honorable James C. Kirkpatrick

Rule Making. Copies of said procedures shall be furnished by the Secretary of State to each agency on or before the effective date of this act, and copies thereof shall be permanently maintained in the office of the Secretary of State and shall be available for public inspection at all reasonable times."

The statutory definition of "rule" was not redefined by Senate Bill No. 58 and remains as it was in Section 536.010, RSMo. Subsection 4 of that section defines rule as follows:

"'Rule' includes every regulation, standard, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include regulations concerning only the internal management of the agency and not directly affecting the legal rights or privileges of, or procedures available to the public."

It is apparent from Senate Bill No. 58 that the procedures the Secretary of State is required to promulgate under Section 536.023(1) were not intended to be within the definition of "rule" as defined in Section 536.010(4). It is also our view that such "rules" as the Secretary may promulgate under Senate Bill No. 58 are not within the definition of "rules" under Section 536.010 because such rules affect only "agencies" and do not have a direct effect on "legal rights or privileges of, or procedures available to the public." We regard Section 536.023(1) as a requirement that the Secretary of State promulgate the necessary procedures to be followed as provided therein, but, as we have indicated, we do not regard that subsection as creating a "rule" making power within the meaning of Senate Bill No. 58.

Very truly yours,



JOHN C. DANFORTH
Attorney General

December 11, 1975

OPINION LETTER NO. 247
Answer by Letter - Klaffenbach

Honorable Donald J. Gralike
State Senator, District 1
648 Buckley Road
St. Louis, Missouri 63125



Dear Senator Gralike:

This letter is in response to your question asking:

"Can the circulator of an initiative referendum petition be under the age of 18? Will the signatures obtained on the petition by a circulator who is under 18 be valid?"

The laws respecting initiative and referendum petitions do not contain requirements limiting the age of the circulator. See § 126.061, RSMo. The circulator must be capable of making the required affidavit.

In the absence of statutory regulation it is said that generally anyone who has knowledge of the facts and is competent to testify may make an affidavit. 3 Am.Jur.2d, Affidavits, § 3, p. 381. Under § 491.060(2), RSMo, a child under ten years of age who appears incapable of receiving just impressions of the facts respecting which he is examined or of relating them truly, is incompetent to testify.

We understand that legislation may be introduced requiring that such circulators be registered voters. However, at this time, there is no such limitation and we conclude that a child who is competent to testify may circulate such petitions.

Very truly yours,

JOHN C. DANFORTH
Attorney General

December 31, 1975

OPINION LETTER NO. 254
Answer by Letter - Klaffenbach

Honorable Michael B. Hazel
Prosecuting Attorney
Pemiscot County
Caruthersville, Missouri 63830

FILED
254

Dear Mr. Hazel:

This letter is in response to your question asking:

"Whether or not members of the Board of Trustees of a third class county hospital are guilty of nepotism under Article VII, Section 6 of the Missouri Constitution if at the time of their election and during part or all of their term of office they have relatives of the fourth degree of consanguinity or affinity working as employees of the county hospital who were employed prior to the time that these Board Members were elected to office?

"Would participation or non-participation in voting when the officials relatives came up for pay increases, promotions and salary increases have an effect on the answer?"

You have mentioned in your correspondence to us the case of State v. Fletchall, 412 S.W.2d 423 (Mo.Banc 1967), and we believe that such case is controlling with respect to your first question because in that instance as in this the officers did not participate in the hiring of their relatives.

In your second question you inquire as to the effect of participation or non-participation in voting when the officials' relatives came up for pay increases, promotions and salary increases.

Mr. Michael B. Hazel

There appears to be some question concerning the facts involved. It is clear, however, that such board members are within the prohibitions of Article VII, Section 6 of the Missouri Constitution. While we find no case authority directly in point to guide us, it is our view that where the employee, who was hired before the board member came into office, received pay increases, such pay increases are merely incidental to the original employment which took place prior to the time such related board member was elected to office. Therefore, the granting of pay increases would not violate the nepotism provision. However, it is also our view that where the board member participates in the appointment of the employee to a distinctly different position, the nepotism provisions of the Constitution are violated.

Very truly yours,

JOHN C. DANFORTH
Attorney General